

IN THE COURT OF COMMON PLEAS OF PAULDING COUNTY, OHIO

BARBARA JEAN MORRIS, *et al.*,

Plaintiffs,

-vs-

THE STATE OF OHIO,

Defendant.

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CASE NO. CI-18-190

JUDGE BECKMAN

FILED
PAULDING COUNTY
JAN E. PEASE
CLERK OF COURTS
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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
SENECA COUNTY RESIDENTS' MOTION TO INTERVENE**

Now come Plaintiffs Barbara Jean Morris, Ronnie and Victoria Kadesch, Richard King, and the Mid-Atlantic Renewable Energy Coalition (collectively, "Plaintiffs"), by and through counsel, who respectfully submit for their Memorandum in Opposition to the "Motion to Intervene of Seneca County Residents Who Live in Close Proximity to Proposed Wind Turbine Projects" filed on December 21, 2018 ("Motion"), the following:

I. INTRODUCTION

This is an action for declaratory judgment from this Court that the wind turbine setback provisions passed into law as part of amended, substitute House Bill 483 ("H.B. 483") are unconstitutional because the General Assembly passed the provisions in violation of the single-subject rule of the Ohio Constitution. The Defendant is the State of Ohio ("State"), which is appropriately represented by the Attorney General's Office.

The Seneca County Residents ("Seneca Residents") are not appropriate intervenors. The Seneca Residents' own Motion reflects, *inter alia*: (a) their interests related to this action are too speculative, remote, and contingent to support intervention; (b) they do not have a legally protectable interest related to this matter; (c) the disposition of this action will not impede their ability to protect their interests; (d) the Seneca Residents are effectively advocating before the

Ohio Power Siting Board (“OPSB”) regarding proposed wind-energy projects in their own county; (e) the Seneca Residents admit their interest in this action aligns exactly with the State and the State is adequately protecting their interests; and, (f) they fail to demonstrate their intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

The Motion and public records also establish the Seneca Residents are represented by the same counsel that represent coal industry interests and systematically attempt to intervene in wind-energy matters throughout the state and before the OPSB to delay and prevent the advancement of wind-energy projects in Ohio. If the Seneca Residents are permitted to intervene, this action will surely be bogged down in protracted litigation that will prejudice the efficient adjudication of the rights of both Plaintiffs and the State.

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 13, 2018, Plaintiffs filed their Complaint for Declaratory Judgment. Plaintiffs seek a declaration from this Court that the wind turbine setback provisions passed into law as part of H.B. 483 are unconstitutional because the General Assembly passed the provisions in violation of the single-subject rule. *Complaint*.

The Defendant is the State because H.B. 483 was signed into law and the provisions at issue appear in the Ohio Revised Code. *Id.* The State is represented by attorneys in the Constitutional Offices Section of the Attorney General’s Office (“AGO”). *Motion to Dismiss filed 12/13/18*. The Attorney General is the chief law officer for the State and the appropriate counsel for defending Plaintiffs’ constitutional challenge to state law.¹

¹ R.C. 109.02 (The attorney general is the chief law officer for the state and all its departments[.] [N]o state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law.... When required by the governor or the

On December 13, 2018, the State filed a Motion to Dismiss (“MTD”). The State’s position is that the amendments to the wind turbine setback provisions pursuant to H.B. 483 are constitutionally valid. *MTD*. Plaintiffs opposed the State’s MTD on December 27, 2018.

On December 21, 2018, the Seneca Residents moved to intervene as defendants as a matter of right or with permission pursuant to Civil Rule 24. *Motion*. The Seneca Residents do not reside in Paulding County or own property in Paulding County. They claim to live in close proximity to wind-energy projects that might be built at some point in the future in Seneca County. *Id.* The Seneca Residents’ Motion states, “if the statutory wind turbine setbacks were to be declared unconstitutional[, they] would immediately be put at risk of suffering physical harm and detrimental health effects from wind turbines sited too close to their residences.” *Id.* at pp. 1-2. The Seneca Residents do not describe any potential “physical harm” or “detrimental health effects,” nor do they provide facts to support their claim they are “immediately” at risk of anything pertaining to wind-turbine projects not yet built. *Motion*. The Seneca Residents also ignore the jurisdictional boundaries of this Court’s decisions, which will only affect the law in Paulding County. *See, e.g., id.* at 4 (alleging, “[i]f the statutory setbacks were to be struck-down [by this Court], the residences [in Seneca County] will immediately be at risk”).

The Seneca Residents discuss two (2) wind-energy projects they are concerned about in their Motion. The projects are at the application stage and pending before the OPSB. The Seneca Residents admit some of them have already intervened in the OPSB proceedings pertaining to one of the projects to protect their interests. Other Seneca Residents have a motion to intervene in the OPSB proceedings pertaining to the second project pending, and the motion is unopposed. *Motion*, pp. 4-5. The Seneca Residents’ own Motion reflects they are effectively advocating for

general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested.”).

their interests pertaining to wind-energy projects in their own county in a more appropriate forum. *Id.*

With regard to this action, the Seneca Residents make the unadorned assertion that their alleged “interests are not adequately represented by any existing part[,]” although they seek the exact same result as the State represented by the AGO: a finding that the challenged portion of H.B. 483 is constitutionally valid. *Id.* at p. 2 (Seneca Residents’ pursuit is “to uphold the constitutionality of the statutory wind turbine setbacks”); *id.* at p. 8 (Seneca Residents’ “defense in this action [is] that R.C. 4906.20 [containing the setback provisions] is constitutional”); *compare MTD*. The Seneca Residents also make the unadorned assertion that their proposed intervention “will neither unduly delay this proceeding nor prejudice the rights of the original parties[,]” *i.e.*, Plaintiffs and the State. *Motion*, p. 2. The Seneca Residents’ Motion, Exhibits, and public records actually establish the opposite. *Infra*.

The Seneca Residents propose to join the State’s MTD, and the motion to dismiss that they proffer with their Motion adds nothing to the MTD already pending before this Court. *Motion*, p. 2; *id.* at Exhibit B; *compare MTD*. The Seneca Residents even go so far as to allege “the State has amply demonstrated in its [MTD]... the provisions of H.B. 483” are constitutionally valid, which is tantamount to an admission their interests are adequately represented. *Motion*, Exhibit B, p. 3.

The Seneca Residents’ Answer proffered with their Motion reflects that they intend to enter this straight-forward declaratory judgment action and employ discovery to go on a fishing expedition, which will surely result in unnecessary, unwarranted, and undue delay and prejudice to the efficient adjudication of the rights of both Plaintiffs and the State. *Id.* at Exhibit C, p. 7 (The proffered “Answer is filed without the benefit of discovery. Intervenors have, or may have,

additional defenses and/or claims arising from this action, which may be determined by future discovery”).

Furthermore, public records attached hereto establish counsel for the Seneca Residents systematically intervene or attempt to intervene in court actions throughout the state and matters before the OPSB to advocate for anti-wind interests, including the coal industry. The public records reflect the likelihood of undue delay and prejudice to the existing parties that will befall this action if the Seneca Residents are permitted to intervene.

Counsel for the Seneca Residents previously intervened on behalf of landowners in several OPSB proceedings to impede wind-energy projects, including the matters referenced in the Motion and *In re Application of Icebreaker Windpower, Inc.*, OPSB Case No. 16-1871-EL-BGN. In the *Icebreaker Windpower* matter, records obtained through discovery (now public records) revealed that the nation’s leading coal mine operator actually funded the intervention and the protracted litigation that resulted. See *Petition to Intervene and Exponent Engagement Letter attached hereto as Exhibit A*.

Counsel for the Seneca Residents have also attempted to intervene in OPSB proceedings directly on behalf of the coal industry. *In re Application of Paulding Wind Farm*, OPSB Case No. 15-2030-EL-BGA, *et al.* In the *Paulding Wind Farm* matter, counsel represented an entity called CAARE, which opposes wind-energy projects. *Petition to Intervene and OPSB Entry attached hereto as Exhibit B*. As recognized by the OPSB:

CAARE describes itself as a non-profit Ohio corporation,... whose purposes, among other things, include: (a) to meet the need for consistent advocacy for affordable and reliable American energy; (b) to preserve and protect the coal industry in its support of coal production, transportation and supply and labor; (c) to challenge renewable portfolio standards and financial and tax incentives for alternative energy sources on both a state and federal level’ [sic]; and (d) to participate in state and federal siting certification proceedings to ensure compliance with all applicable standards and regulations. CAARE membership

includes a number of operating coal production, transportation and logistics, and manufacturing companies located in Ohio, West Virginia, and the region.

OPSB Entry, ¶ 13. Counsel for the Seneca Residents also delay wind-energy projects by appealing OPSB approvals. *See, e.g., In re Application of Black Fork Wind Energy, LLC*, 2018-Ohio-5206; *Notice of Appeal attached hereto as Exhibit C*.

In sum, if the Seneca Residents are permitted to intervene through the same counsel that represents coal industry interests, systematically attempts to intervene in wind-energy matters, and regularly appeals pro-wind decisions, this straight-forward declaratory judgment action will become protracted litigation unnecessarily.

III. DISCUSSION

A. Standards for intervention

The Seneca Residents moved to intervene either as of right or with permission. *Motion*.

Civil Rule 24 governs intervention and provides, in pertinent part:

(A) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(B) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Supreme Court of Ohio has indicated that Civil Rule 24 should be construed liberally to permit intervention. *State ex rel. Merrill v. Ohio Dept. of Nat. Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 41. However, permission to intervene is not without limits

and applicants must meet the requirements. *Merrill*. It is the Seneca Residents' burden to establish eligibility to intervene. Civ.R. 24; *infra*.

"Failure of the party seeking to intervene [as of right] to satisfy each of the requirements will result in a denial of the motion." *Houtz v. Houtz*, 2018-Ohio-1738, 111 N.E.3d 888, ¶ 21 (6th Dist.). According to the Supreme Court, for intervention as of right, Civil Rule 24(A)(2) provides that an applicant shall be allowed to intervene in an action "when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may... impede the applicant's ability to protect that interest." Further, the applicant's interest must be one that is "legally protectable," and "must not be adequately protected by the existing parties." *Merrill* at ¶ 42 (citations omitted) (emphasis added); *Velocity Dev., LLC v. Perrysburg Twp. Bd. of Trustees*, 6th Dist. Wood No. WD-11-037, 2011-Ohio-6192, ¶ 15 ("[I]ntervenor must demonstrate that his or her interest is not adequately represented by the existing parties."); *Houtz* at ¶ 20 (same). "Failure to meet any one of the elements in Civ.R. 24(A) will result in denial of the right to intervene." *Fairview Gen. Hosp. v. Fletcher*, 69 Ohio App.3d 827, 831, 591 N.E.2d 1312 (10th Dist.1990).

According to the Supreme Court, for permissive intervention, Civil Rule 24(B)(2) provides that a trial court has discretion to permit an applicant to intervene "when [the] applicant's claim or defense and the main action have a question of law or fact in common." However, in exercising its discretion, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Merrill*, 130 Ohio St.3d at ¶ 43 (emphasis added). A trial court does not abuse its discretion in denying permission to intervene unless its decision is "unreasonable, arbitrary or unconscionable." *Houtz*, 2018-

Ohio-1738 at ¶ 17, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *Merrill* at ¶ 41.

B. Seneca Residents have not met their burden and their Motion should be denied.

1. Seneca Residents do not qualify for intervention as of right

(a) Lack of an adequate interest in this action

This is an action for declaratory judgment that the wind turbine setback provisions passed into law as part of H.B. 483 are unconstitutional due to a violation of the single-subject rule. *Complaint*. The State is the Defendant and the AGO is adequately defending the purported constitutionality of the law. The Seneca Residents allege, and for purposes of this opposition, admit that the State is “amply” defending this lawsuit. *Motion*, Exhibit B, p. 3 (claiming “the State has amply demonstrated in its [MTD]... the provisions of H.B. 483” are constitutionally valid). Notwithstanding, the Seneca Residents needlessly seek to intervene as of right; however, they do not meet the requirements.

Although the Seneca Residents generally allege an interest relating to the subject matter of this action:

Chaos would result if every citizen “interested” in the outcome of new legislation were permitted to intervene in litigation interpreting that legislation. The interest of the intervenor must be more particularly in the subject matter of the lawsuit.

Fletcher, 69 Ohio App.3d at 831. An interest that is too speculative, remote, or contingent is insufficient to support intervention. *Id.* at 832.

The results of this action will affect Paulding County. The Seneca Residents do not reside in Paulding County or own property in Paulding County. *Motion*. They claim to live near proposed wind-energy projects in Seneca County that have not yet been approved by the OPSB. This Court’s decision will not affect the Seneca Residents or the projects in their county in the

near future, if ever. The Seneca Residents' bald assertion, "if the statutory wind turbine setbacks were to be declared unconstitutional [by this Court, they] would immediately be put at risk" is simply inaccurate. *Motion*, pp. 1-2.²

The Seneca Residents' alleged interest in this action is too speculative, remote, and contingent to support eligibility for intervention as of right. To be sure, if every citizens with the same level of interest as the Seneca Residents were all allowed to intervene in this action, chaos would ensue. *See Fletcher* at 831; *supra*.

Moreover, the Seneca Residents have not established their alleged interest in this action is a "legally protectable" interest. *See Merrill*, 130 Ohio St.3d at ¶ 42.

In Ohio,... [s]tanding to sue is part of the common sense understanding of what it takes to make a justiciable case. Standing involves a determination of whether a party has alleged a personal stake in the outcome of the controversy to ensure the dispute will be presented in an adversarial context. A personal stake requires an injury to the plaintiff.

Bank of Am., N.A. v. Barber, 11th Dist. Lake No. 2013-L-014, 2013-Ohio-4103, ¶ 16 (internal quotations and citations omitted) (emphasis added). Further, due process requires notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *In re Morris*, Bankr. N.D. Ohio No. 05-68481, 2006 WL 4459436, *1, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The Seneca Residents claim they live near sites for proposed wind-energy projects in Seneca County, but the outcome of this action will only affect the law pertaining to wind turbine

² The Seneca Residents further allege, "if the statutory wind turbine setbacks were to be declared unconstitutional[, they] would immediately be put at risk of suffering physical harm and detrimental health effects from wind turbines sited too close to their residences." *Motion*, pp. 1-2. Of course, the Seneca Residents do not describe any potential "physical harm" or "detrimental health effects" in their Motion. Those unadorned assertions do not change the intervention analysis and should be disregarded.

setbacks in Paulding County. Further, the Seneca Residents' interest in this case aligns exactly with the State. Accordingly, they have not alleged a sufficient personal stake in the outcome of this case, they are not subject to injury, nor will their involvement ensure this dispute will be presented in an adversarial context—the State is adequately representing their interest.

The Seneca Residents further admit they have notice of the proposed wind-energy projects in their county and they are effectively advocating against the proposed projects before the OPSB. *Motion*, pp. 3-5 (discussing two (2) wind-energy project applications pending before the OPSB pertaining to facilities yet to be approved or constructed in Seneca County, indicating some Seneca Residents have already intervened in the proceedings pertaining to one project and other Seneca Residents have a motion to intervene in the proceedings pertaining to the second project pending, which is unopposed).³

Accordingly, the Seneca Residents have not established a legally protectable interest related to this action or that a legally protectable interest is being infringed.

(b) The disposition of this action will not impede the Seneca Residents' ability to protect their interests

The Seneca Residents have not met their burden to establish they are “so situated that the disposition of [this] action may as a practical matter impair or impede” their ability to protect their interests. Civ.R. 24(A)(2). The Seneca Residents are concerned about wind-energy projects at the application phase before the OPSB that have not been built and may never be built in Seneca County. *Motion*. As set forth above and in their Motion, they have notice of the proposals pending before the OPSB to site wind-energy projects in their county and they are effectively advocating for their interests with regard to those proposed projects. *Id.*; *supra*. This is not a case

³ See also *Fletcher*, 69 Ohio App.3d at 836 (“A right to participate in an administrative hearing [e.g., before the OPSB] does not necessarily translate into a conditional right to intervene in a civil action”).

where this Court granting the relief sought will “make it impossible for [the Seneca Residents] to protect” their interests. *See Fletcher*, 69 Ohio App.3d at 834.

This Court’s decision regarding the constitutional validity of H.B. 483’s amendment to the wind turbine setback provisions will only affect the law in this county and not Seneca County. The Seneca Residents incorrectly assert in their Motion that if this Court were to invalidate H.B. 483’s amendments to the setback law, they “immediately would be subject to turbines being sited too close to their homes” in Seneca County. *Motion*, p. 7. That is simply not true.

Accordingly, the disposition of this action may not, as a practical matter, impair or impede the Seneca Residents’ ability to protect their interests.

(c) Seneca Residents’ interest is adequately represented by the State

Intervention as of right is only proper when the prospective intervenor’s interests are not adequately represented by the existing parties. Further, it is the Seneca Residents’ burden to prove their interests are not adequately represented by the State. *Merrill*, 130 Ohio St.3d at ¶ 42; *Velocity Dev.*, 2011-Ohio-6192 at ¶ 15; *Houtz*, 2018-Ohio-1738 at ¶ 20; *see also Fletcher*, 69 Ohio App.3d at 831 (“Failure to meet any one of the elements in Civ.R. 24(A) will result in denial of the right to intervene.”).

The Seneca Residents’ interest in this action is aligned exactly with the State’s position. *MTD*; *compare Motion*, p. 2 (Seneca Residents’ pursuit is “to uphold the constitutionality of the statutory wind turbine setbacks”); *id.* at p. 8 (Seneca Residents’ “defense in this action [is] that R.C. 4906.20 [containing the setback provisions] is constitutional”). If permitted to intervene, the Seneca Residents propose to join the State’s *MTD* and the motion to dismiss they proffer along with their Motion adds nothing to the *MTD* already pending before this Court. *Id.* at Exhibit B;

compare MTD. The Seneca Residents even go so far as to allege “the State has amply demonstrated in its [MTD]... the provisions of H.B. 483” are constitutionally valid, which is tantamount to an admission their interests are adequately represented. *Motion*, Exhibit B, p. 3. This Court’s analysis can end here with regard to the issue of adequate representation.⁴

Furthermore:

Representation is generally considered adequate if [1] no collusion is shown between the representative and an opposing party, if [2] the representative does not represent an interest adverse to the proposed intervenor and if [3] the representative has been diligent in prosecuting the litigation.

A party charged by law with representing the interests of the absent party will usually be deemed adequate to represent the proposed intervenor.

Fletcher at 835 (citations omitted). There is no collusion between the State and Plaintiffs. The existing parties are clearly at odds as reflected in the briefing of the State’s MTD. The State does not represent an interest adverse to the Seneca Residents. On the contrary, they pursue the same outcome of this action: a finding that the challenged portion of H.B. 483 is constitutionally valid. *Motion; MTD*. The record reflects the State has been diligent in defending this action and the Seneca Residents agree. *Motion*, Exhibit B, p. 3.

By law, the AGO is the appropriate counsel to defend Plaintiffs’ constitutional challenge to Ohio law. *See* R.C. 109.02. The assistant attorneys general in the Constitutional Offices Section of the AGO representing the State are presenting an appropriate defense. *Record; MTD*. In sum, there is no merit to the Seneca Residents’ assertion that their alleged interest in this action is not adequately represented by any existing party. *Motion*, p. 2.

⁴ *See Fletcher* at 835 (“[The applicant] failed to show its interest will not be adequately represented by the [an existing party]. Although [the applicant] may have a possible... interest produced by the results of litigation, both parties share identical positions on the primary issue involved in the litigation[.] Therefore,... the trial court correctly denied [the] motion to intervene as a matter of right.”).

The Seneca Residents have not met their burden to prove the necessary elements pursuant to Civil Rule 24(A) to establish eligibility to intervene as of right. Accordingly, their Motion should be denied.

2. Seneca Residents should not be permitted to intervene

The Seneca Residents' claims and defenses, taken at face value, share a common question of law with this action. *Motion*; Civ.R. 24(B)(2). However, the Seneca Residents have failed to demonstrate their intervention will not unduly delay or prejudice the adjudication of the rights of Plaintiffs or the State. *Id.*; *Merrill*, 130 Ohio St.3d at ¶ 43 (“[I]n exercising its discretion, the [trial] court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”); *Merrill* at ¶ 45 (When a prospective intervenor demonstrates “that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, it meets the requirements of Civ.R. 24(B)(2) for permissive intervention.”).

This is a straight-forward declaratory judgment action against the State challenging the constitutionality of a statute. *Complaint*. There is no question that if the Seneca Residents are permitted to intervene both Plaintiffs and the State will be subjected to undue delay and prejudice regarding their pursuit of efficient adjudication. There is no need for the Seneca Residents to intervene. As discussed above, they admit their interest in this action aligns exactly with the State and the AGO is the appropriate counsel to defend this action. *Supra*.

The Seneca Residents proffered an Answer that reflects they intend to enter this action and employ discovery to go on a fishing expedition. *Motion*, Exhibit C, p. 7 (The “Answer is filed without the benefit of discovery. Intervenors have, or may have, additional defenses and/or claims arising from this action, which may be determined by future discovery”).

Furthermore, the public records discussed above and attached hereto establish counsel for the Seneca Residents systematically intervene or attempt to intervene in court actions throughout the state and matters before the OPSB to advocate for anti-wind interests, including the coal industry. The public records reflect the undue delay and prejudice that will befall this action if the Seneca Residents are permitted to intervene.

For instance, counsel for the Seneca Residents previously intervened on behalf of landowners in several OPSB proceedings to impede wind-energy projects, including the matters referenced in the Motion. In another matter, *Icebreaker Windpower*, records obtained through discovery (now public records) revealed that the nation's leading coal mine operator actually funded the intervention and the protracted litigation that resulted. *See Exhibit A; supra.*

Counsel for the Seneca Residents have also attempted to intervene in OPSB proceedings directly on behalf of the coal industry. In the *Paulding Wind Farm* matter, counsel represented an entity called CAARE, which opposes wind-energy projects and describes itself as:

[A] non-profit Ohio corporation,... whose purposes, among other things, include: (a) to meet the need for consistent advocacy for affordable and reliable American energy; (b) to preserve and protect the coal industry in its support of coal production, transportation and supply and labor; (c) to challenge renewable portfolio standards and financial and tax incentives for alternative energy sources on both a state and federal level' [sic]; and (d) to participate in state and federal siting certification proceedings to ensure compliance with all applicable standards and regulations. CAARE membership includes a number of operating coal production, transportation and logistics, and manufacturing companies located in Ohio, West Virginia, and the region.

Exhibit B, OPSB Entry, ¶ 13; *supra*. Counsel for the Seneca Residents also delay wind-energy projects by appealing OPSB approvals. *See, e.g., In re Application of Black Fork Wind Energy, LLC*, 2018-Ohio-5206; *Exhibit C; supra.*

If the Seneca Residents are permitted to intervene through the same counsel that represents coal industry interests, systematically attempts to intervene in wind-energy matters,

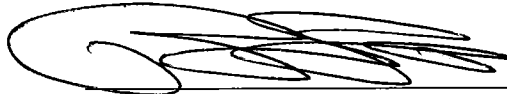
and regularly appeals pro-wind decisions, this straight-forward declaratory judgment action will become protracted litigation unnecessarily and prejudice the efficient adjudication of the rights of both Plaintiffs and the State.

The Seneca Residents have failed to meet their burden to prove their intervention will not unduly delay or prejudice the adjudication of the rights of the original parties pursuant to Civil Rule 24(B). Accordingly, it is not unreasonable, arbitrary, or unconscionable to deny intervention. The Seneca Residents' Motion should be denied.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Seneca Residents' Motion to Intervene.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2019, a true and accurate copy of the foregoing was served by electronic mail upon the following:

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COLUMBUS 56246-11 104808v2

EXHIBIT A

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Icebreaker)	
Windpower Inc., for a Certification to)	
Construct a Wind-Powered Electric)	Case No. 16-1871-EL-BGN
Generation Facility in Cuyahoga County,)	
Ohio)	

PETITION TO INTERVENE OF BRATENAHN RESIDENTS
W. SUSAN DEMPSEY, ROBERT M. MALONEY, GREGORY BINFORD,
AND LEON BLAZEY, JR.

Pursuant to R.C. 4906.08(A)(3), R.C. 4906.08(B), and O.A.C. 4906-2-12(B) & (C), Cuyahoga County residents W. Susan Dempsey, Robert M. Maloney, Gregory Binford, and Leon Blaze, Jr. (together, the "Bratenahl Residents"), who live in the Village of Bratenahl, hereby petition the Ohio Power Siting Board for an order granting their intervention as parties in this proceeding.

Good cause exists for granting the Bratenahl Residents leave to intervene in this case after the 30-day period set forth in R.C. 4906.08(A)(3) and O.A.C. 4906-2-12(A)(2)(b). The Bratenahl Residents initially understood that the proposed project (the "Proposed Project") would simply involve the installation to six (6) wind turbines in Lake Erie. They did not understand that the Proposed Project is likely to be a precursor to an additional 1000+ wind turbines being sited in Lake Erie. In addition, they did not realize the extent of the damage to birds and bats that is likely to be caused by the Proposed Project.

Moreover, pursuant to the October 23, 2017 Motion to Suspend the Procedural Schedule (the "Staff Motion to Suspend") filed by the Ohio Power Siting Board ("OPSB") staff, and the OPSB's October 23, 2017 Entry granting that motion, the OPSB has stayed the procedural schedule in this case – requiring the scheduling of another public hearing and the adjudicatory

hearing at some future date, as yet undetermined. Thus, there will be no prejudice to the parties by the Bratenahl Residents' intervention in this case.

This Petition to Intervene is supported by the Memorandum In Support set forth below.

Respectfully submitted,

/s/ John F. Stock

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Maloney, Gregory Binford, and Leon Blazey,
Jr.*

**MEMORANDUM IN SUPPORT OF
PETITION TO INTERVENE**

A. The Intervenors

Intervenor W. Susan Dempsey is a life-long resident of Cuyahoga County. She grew up in Euclid, with a beach and Lake Erie at the end of her street. She learned to swim in Lake Erie before she could walk. The Dempsey family had a summer cottage in Eastlake, where Ms Dempsey and her six siblings spent summer vacations, swimming, boating, and fishing in Lake Erie. Later, Ms. Dempsey spent ten years "crewing" on racing sail boats throughout the Lake.

Ms. Dempsey attended college and graduate school in Cuyahoga County. She has always lived, worked, and paid taxes in Cuyahoga County. Currently, Ms. Dempsey owns a condominium in Bratenahl. From the ninth floor balcony of her condominium, she watches all varieties of birds, including geese, ducks, eagles, great blue herons, and sea gulls. She regularly enjoys sunsets on the Lake: the proposed wind turbines' killing of birds and bats and blot on the

aesthetic beauty of Lake Erie would directly affect her. The time and money that Cuyahoga County has invested in Applicant Icebreaker Windpower Incorporated's ("Applicant" or "Icebreaker") proposed six (6) turbine Lake Erie wind project (the "Proposed Project") have been funded with Ms. Dempsey's county tax dollars. Ms. Dempsey is a consumer of electricity distributed through the PJM grid in Cuyahoga County. She pays federal income taxes: the millions of federal grant dollars paid (and to be paid) for the Proposed Project have been funded with her federal tax dollars. Thus, Ms. Dempsey has numerous, direct interests to be protected in this proceeding.

Intervenor Robert Maloney has lived in Cuyahoga County for many years. He currently owns a condominium and resides in Bratenahl. He owns a boat, docked at Newport Harbor Boat Club, and regularly boats on Lake Erie. He's an avid fisherman and swimmer in the Lake. Mr. Maloney sometimes drinks water directly from the Lake while fishing. He also enjoys birding at the Lake Erie Nature Preserve, which teams with migratory birds and resident bald eagles. He visits the Lake Erie islands and uses the public beaches in Mentor and Cleveland, a 10-minute walk from Lake Erie. Mr. Maloney pays Cuyahoga County real estate taxes. He pays federal income taxes. Thus, Mr. Maloney has numerous, direct, personal interests to be protected in this proceeding.

Intervenor Gregory Binford has lived in Cuyahoga County for 65 years. He currently owns a condominium and resides in Bratenahl. He regularly boats on Lake Erie. He fishes and swims in the Lake. He also enjoys viewing birds at the Lake Erie Nature Preserve. He visits the Lake Erie islands and uses the public beaches in Mentor and Cleveland., a 10-minute walk from Lake Erie. Mr. Binford pays Cuyahoga County real estate taxes. He pays federal income taxes. Thus, Mr. Maloney has numerous, direct, personal interests to be protected in this proceeding..

Intervenor Leon Blazey, Jr. has lived in Cuyahoga County for many years. He currently owns property and resides in Bratenahl. He enjoys his beautiful viewshed out over the Lake. He enjoys feeding and watching Lake Erie birds.

The Bratenahl Residents possess legally-protectable interests that are endangered by Icebreaker's Proposed Project. And the existing parties to this proceeding cannot represent the Bratenahl Residents and will not protect their direct personal interests. The Bratenahl Residents are entitled to intervene in this proceeding pursuant to R.C. 4906.08(A)(3) and O.A.C. 4906-2-12.

B. Statement of Good Cause for Intervention After 30-Day Period

As noted, the Bratenahl Residents did not previously seek to intervene in this case to oppose the Proposed Project because they initially understood that the project would simply involve the installation to six (6) wind turbines in Lake Erie. They did not realize that the Proposed Project is likely to be a precursor to an additional 1000+ wind turbines being sited in Lake Erie. In addition, they did not realize the extent of the damage to birds and bats that is likely to be caused by the Proposed Project.

Moreover, the Staff Motion to Suspend: (1) acknowledges that the Proposed Project is "precedent-setting"; (2) acknowledges that Applicant has not provided to the OPSB valid pre- and post-construction radar monitoring studies necessary for the OPSB to determine the probable environmental impact of the Project on birds and bats; and (3) recommends that the date on which Applicant submits scientifically-valid studies to the OPSB serve as the new effective date of the Application:

. . . Staff believes it is necessary that Applicant provide it with additional supplemental information on the viability and design of the pre- and post-construction radar monitoring protocol that Applicant intends to utilize at the project site for determining project impacts. . . . *This information is necessary to measure*

the effect of off-shore turbines on birds and bats as discussed further below. . . . Staff would anticipate that a new procedural schedule would . . . include new dates for scheduling a second public hearing and scheduling the evidentiary hearing.

. . . Staff proposes that the date the Applicant submits this supplemental information to Staff to serve as the Applicant's new effective date for its application, so that a new procedural schedule, including the scheduling of a second public hearing, can be established in this case. (Emphasis added).

Staff Motion to Suspend at 1 – 3.

Similarly, the U.S. Fish And Wildlife Service (“FWS”) concludes that Applicant’s pre- and post-construction bird and bat studies, cited in the U.S. Department of Energy’s (“DOE”) draft Environmental Assessment (the “Draft EA”), are insufficient:

The conclusions reached in the [D]raft EA regarding potential impacts to birds and bats are based on available data collected primarily outside of the project area. . . . Additional data on bird use of the airspace were generated using NEXRAD weather radar data from the Cleveland area which provides limited data about bird and bat use within the airspace that will be occupied by the turbines (the “rotor-swept zone.”). . . . Studies of bird and bat use of the specific project area have been recommended by the Service for several years . . . but are just starting to be implemented. . . . Data from these site-specific studies are not available for inclusion in the Draft EA. (Emphasis added).

Thus, the conclusions in the Draft EA are based on assumptions that observations from other parts of Lake Erie are relevant to the project area, and that impacts at onshore wind facilities in the U.S. and Canada are relevant predictors of impacts to birds and bats at offshore wind developments in Lake Erie. *These assumptions may or may not be accurate.* Because of the potential risk of bird and bat mortality, and because this project is designed to be a demonstration project to evaluate offshore wind installation in the Great Lakes, pre-construction monitoring to inform risk and post-construction monitoring to assess actual impacts are necessary components of the project that must be implemented.

. . . If per-turbine impacts are not accurately measured for this precedent-setting project, risk levels of larger future projects may be substantially underestimated. (Emphasis added).

October 4, 2017 FWS Letter to DOE at 2 – 3 (filed with the OPSB on November 7, 2017).

Moreover, FWS not only concluded that Applicant's study data are insufficient, FWS also concluded that certain assertions made by Applicant concerning Lake Erie bird and bat data (parroted in DOE's Draft EA) are affirmatively misleading:

Section 3.4.1.3 of the Draft DA describes the Affected Environment relative to birds and bats. Pages 3-29 and 3-32 describe a NEXRAD weather radar analysis of bird and bat use of the project area Page 3-32 states, "Several recent studies employing marine radar in shoreline environments have demonstrated relatively high densities of nocturnal migrant birds along the shorelines of Lake Erie and Lake Ontario, *reinforcing the understanding that such migrants tend to concentrate along coastlines and avoid flying over large water bodies, such as Lake Erie, if possible* Page 3-51 includes a similar statement. *These statements are misleading These [cited] publications instead state that migrants concentrate on the shoreline during dawn and daytime when they land to rest and refuel. During the actual nocturnal migration, however, migrants commonly cross Lake Erie and all of the other Great Lakes.* . . . (Emphasis added).

Id. at 3.

This case is re-starting back at "square one." Applicant's Application is incomplete at this point; it will not be considered complete until after Applicant submits to the OPSB scientifically-valid pre-construction bird and bat studies that are necessary for the OPSB to make its statutorily-required findings and determinations of the probable environmental effects of the Proposed Project. If and when Applicant provides that scientifically-valid information to the OPSB – Applicant has not provided such information to date – the date of that submission will become the new effective date of the Application and the public hearing and adjudicatory hearing process will begin anew. These circumstances constitute good cause and extraordinary circumstances justifying leave for the Bratenahl Residents to intervene in this case at this time.

C. Intervenors' Protected Interests

The Proposed Project is the first proposed freshwater offshore wind turbine facility to be located in North America and in the Great Lakes. The Proposed Project is not intended to be a commercially feasible, stand-alone electric generating facility. Over one hundred million dollars

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will be invested to construct and operate six (6) wind turbines that, at best, will produce only a miniscule amount of electricity (no more than 20.7MW at theoretically full capacity). This makes absolutely no economic sense of itself. Rather, Applicant fully intends for the Proposed Project to be simply a loss-leader "icebreaker" – the first wind turbine project to be permitted for construction in the Great Lakes. Once the Proposed Project breaks the barrier against privately-owned wind turbine installations in the Great Lakes, Applicant fully intends to seek to obtain OPSB authorization to install an exponentially greater number of wind turbines in the Lake, capable of producing enough electricity, albeit uncompetitively-expensive electricity, to obtain some meaningful return on its enormous investment.

Applicant attempts to convince the OPSB that it should break the barrier against permitting a private commercial enterprise to install and operate wind turbines in the Great Lakes by urging that the Proposed Project will be a "demonstration" – that it will provide valuable information about the ecological effects of wind turbine projects in the Great Lakes and information about the financial viability of such projects that will assist regulatory agencies in forming sound public policy for "future larger-scale offshore wind farms in Lake Erie and the other Great Lakes." Application at 3. As set forth in detail below, that assertion is nonsense. The construction and operation of the Proposed Project will provide no material information regarding environmental impacts or energy economics that cannot be obtained before, or without, construction of the project. Indeed, both the OPSB Staff and USFWS acknowledge that Applicant has failed to identify – much less implement – scientifically-sound methodologies for accurately assessing the probable environmental impacts of the Proposed Project on birds and bats. For that reason alone, the OPSB cannot grant a certificate to Applicant to build the project.

1. ***The State of Ohio Holds Lake Erie In Trust for the Benefit of Ohio's Citizens. Certification of Icebreaker's Proposed Project Would Violate that Public Trust.***

The State of Ohio's ownership of its portion of the land under Lake Erie is subject to the "Public Trust Doctrine." *Illinois Railroad Company v. Illinois*, 146 U.S. 387 (1892). The State of Ohio holds title to its portion of Lake Erie in trust for the benefit of the people of the State, not for the benefit of private-party Icebreaker. The State of Ohio's title in Lake Erie:

... is a title different in character from that which the state holds in lands intended for sale. *It is a title held in trust for the people of the state*, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing on them, *freed from the obstruction or interference of private parties*. . . . The trust devolving upon the state *for the public*, and which can only be discharged by the management and control of the property *in which the public has an interest*, cannot be relinquished by a transfer of the property. . . . (Emphasis added).

146 U.S. at 452-453. *See also State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303, 345-346 (1948), quoting *Illinois R. Co., supra*. The State of Ohio holds title in Lake Erie in trust for the benefit of the Bratenahl Residents, not for the benefit of Norwegian corporation Fred Olsen Renewables, not for the benefit of intervenor Sierra Club, not for the benefit of intervenor Environmental Council, and not for the benefit of Maryland-based intervenor Offshore Wind Business Network.

2. ***The Application Fails to Meet the Requirements of Ohio Law.***

The pending Application for a Siting Certificate fails to comply with the requirements of R.C. Chapter 4906, OAC Chapter 4906-4, and OAC Rule 4906-17-05. The Application must be denied.

Specifically, the Application is legally deficient for the following reasons.

a. The Application completely fails to establish "[t]he nature of the probable environmental impact" of the Proposed Project, much less that the Proposed Project "represents

the minimum adverse environmental impact," as required by R.C. 4906.10(A)(2) and (3), respectively.

The Staff Motion to Suspend establishes that the Application, to date, utterly fails to establish the probable environmental impacts of the precedent-setting Proposed Project on birds and bats:

Construction and operation of off-shore wind turbines presents a very different set of challenges than land-based turbines in terms of wildlife impact measurement. *The Great Lakes has unique ecological properties compared to land installations. Due to the fact that this project is precedent-setting, since it is the first proposed off-shore wind facility in Lake Erie, Staff requires more information on the radar technology monitoring protocol it selected for this small demonstration project and whether it can reliably measure the effect of off-shore turbines on birds and bats and inform of the risk levels for future development projects in Lake Erie.* The pre-construction radar monitoring protocol is important to Staff's investigation because it establishes baseline conditions using methodologies that will be duplicated during the operational phase to provide robust pre- vs. post-construction comparisons for impact assessment. (Emphasis added).

Motion to Suspend at 2- 3.

For example, the bird and bat risk studies and summaries that Applicant cites for the proposition that the Proposed Project presents "low risk" to birds and bats actually do nothing other than confirm that Applicant has absolutely no scientifically-sound basis to know whether the Proposed Project will kill significant numbers of birds and bats. Applicant does not even know the location of nocturnal migratory bird flight paths over Lake Erie, much less the number of birds that migrate across the lake or the altitude at which they cross the lake, i.e., whether the millions of birds migrating across Lake Erie at night will fly through the turbines' rotor swept zone ("RSZ") – 65 feet (20 meters) to 479 feet (146 meters) above the water surface.¹

¹ However, the U.S. Fish and Wildlife Service's Spring 2012 MERLIN avian radar (not NEXRAD weather radar) study of Lake Erie shows that up to 17,000 birds per hour fly over Lake Erie at night during peak pulses of Spring migration. Great Lakes Avian Radar Technical Report Lake Erie Shoreline: Erie County, Ohio and Erie County Pennsylvania, Spring 2012, Rebecca Horton, et al., at 18. Moreover, FWS's radar study revealed that "peak density [of birds] was found to occur between 50 – 150m [164 ft. – 492 ft.] above ground level." *Id.* at vi (emphasis added).

Since the inception of this Proposed Project, Applicant and its predecessors have been at odds with USFWS and ODNR over the proper pre-construction testing methodologies that must be deployed to obtain scientifically-valid data to determine the Proposed Project's "probable environmental impact" on birds and bats – testing that must be completed during the spring and fall migration seasons before Applicant begins construction (proposed to commence in April 2018). And that disagreement has not been resolved. Indeed, in the July 20, 2017 Avian and Bat MOU between Applicant and ODNR and the accompanying July 17, 2017 Icebreaker Wind Avian And Bat Monitoring Plan, Lake Erie, Ohio (the "Monitoring Plan") that Applicant has submitted to the OPSB, Applicant acknowledges that it has not yet reached agreement with ODNR regarding the scientifically-valid pre-construction methodologies that must be used by Applicant to determine the Proposed Project's probable environmental impact on birds and bats:

Due to the unprecedented nature of this demonstration project, protocols for determining potential impacts to birds and bats in an offshore environment have not previously been established for the Great Lakes. . . .

* * *

. . . With regard to radar monitoring, [the Monitoring Plan] articulates the [Applicant] project team's commitment to work with ODNR, OPSB, and other agencies and stakeholders to retain an objective third party radar expert to determine the feasibility and precise design of any pre- and post-construction radar monitoring surveys. (Emphasis added).

Monitoring Plan at 1, 2.

Furthermore, post-construction monitoring for the Proposed Project will not enable Applicant to obtain scientifically-valid data as to the Project's environmental impact (e.g., collision deaths) upon birds and bats. Applicant has repeatedly acknowledged in its filings with the OPSB that it will be impossible to determine turbine-caused bird and bat fatalities for wind

Thus, USFWS found that the greatest density of nocturnally migrating birds are located within the altitude of the Proposed Project's Rotor Swept Zone, 65.62 ft. to 479.03 feet.

turbines that are located in water. Applicant's own avian experts admit that post-construction bird mortality studies for this offshore project will be "*extremely difficult, if not impossible*" to perform. Final Avian Risk Assessment, Kerlinger & Guarnaccia (October 2013), at 11 (emphasis added). Applicant repeats that admission in its Monitoring Plan:

[Applicant] recognizes that the potential for birds and/or bats to collide with Project infrastructure during the Project's operational phase *is of primary importance for the Project and for the Monitoring Plan*. [Applicant] also recognizes that the well-established methods for monitoring such impacts at land-based wind energy facilities cannot be performed at an offshore facility such as the Project. Although several promising technologies are under development, *no proven effective technologies to perform bird/bat collision monitoring at offshore wind energy facilities are currently available*; however, several emerging technologies appear promising. (Emphasis added).

Monitoring Plan at 12.

FWS has admonished DOE (and filed its comments with the OPSB) that Applicant's undefined, and/or deficient proposed post-construction monitoring will not provide any scientifically-valid information as to the environmental threat to birds and bats posed by future, larger wind turbine installations in the Great Lakes:

... It will be difficult to detect carcasses struck by turbines in the open water environment. Developing and validating methods for generating robust mortality estimates for bats and birds, and testing methods to collect and identify carcasses at offshore wind project is *critically important if this demonstration project is to inform future offshore wind development in the Great Lakes and elsewhere*. . . . However, in order to first test if these technologies would be effective, preferably in conjunction with each other, they need to be tested on land where traditional fatality monitoring could also be done for validation purposes. *To date these tests have not occurred.* The Service recommends that the [D]raft EA be revised to include a plan for effective fatality monitoring and that the techniques be validated using land-based facilities prior to funding construction and preferably prior to finalizing the EA. . . .

... [G]iven the lack of defined robust pre- and post-construction studies, there is likely to be little more certainty of biological impacts after the project is constructed and operating than is currently available. (Emphasis added).

October 4, 2017 FWS Letter to DOE at 8.

Thus, Applicant admits both that (1) bird and bat collision fatalities are an environmental impact of primary importance for the Project, and (2) its Application fails to identify for the OPSB any specific, scientifically-valid methodology it will employ to accurately assess that primary environmental impact and mitigate it, if possible. In short, Applicant has acknowledged that its Application fails to establish “the nature of the probable environmental impact” (R.C. 4906.10(A)(2)), much less that the Proposed Project “represents the minimum adverse environmental impact” (R.C. 4906.10(A)(3)). FWS’s analysis confirms that the Application is legally-deficient.

R.C. 4906.10(A) provides that “[t]he board *shall not grant a certificate for the construction, operation, and maintenance of a major utility facility . . . unless it finds and determines* all of the following: . . . (2) [t]he nature of the probable environmental impact; [and] (3) [t]hat the facility represents the minimum adverse environmental impact.” The Application does not even proffer to the OPSB any scientifically-valid means by which the OPSB may make its required findings and determinations as to the environmental impacts of the Proposed Project, and that the Proposed Project represents the minimum adverse environmental impact for birds and bats. The OPSB must deny the Application for these reasons.

2. The Application fails to establish that the Proposed Project will serve the interests of electric system economy and reliability as required by R.C. 4906.10(A)(4). Applicant admits that as a “demonstration” project, the Proposed Project is neither commercially feasible nor economically justified. The Proposed Project has a “nameplate” capacity of only 20.7 MW, and, according to Applicant, is expected to operate at only 41.4% of that modest capacity. Moreover, the Proposed Project is heavily dependent upon substantial public financial subsidies – including more than \$40 million in federal grants, federal investment tax and production tax credits, and

state property tax exemptions – with absolutely no showing that the project feasibly can lead to construction of a commercial-scale generation facility that would be efficient and economically competitive. The Proposed Project cannot compete in the wholesale electricity market. The April 2009 Great Lakes Wind Energy Center Final Feasibility Report shows that the Proposed Project would sell its small output at roughly three times wholesale electricity prices in the region.

Moreover, PJM Interconnection LLC currently assigns only a 17.6% capacity factor for new, onshore wind-powered generation facilities. This means, for example, that a new, commercial-scale 1000MW wind facility would have to be supported by 824 MW of additional fossil fuel-fired electric generation to power 1000MW of load growth. Under no circumstances will the Proposed Project, or any expansion of the Proposed Project to a commercial-scale size of 1,000 turbines or more, ever supplant PJM base load fossil fuel-fired electricity. The Proposed Project does not serve the interests of electric system economy or stability.

3. For the reasons set forth herein, the Application fails to establish that the Proposed Project will serve the public interest, convenience and necessity as required by R.C. 4906.10(A)(6). In sum, Applicant requests the OPSB to authorize construction of a privately-owned project that will visit currently-unknown, and potentially vast, environmental harms upon Lake Erie for no economic return – the Proposed Project will intermittently, and inefficiently, produce expensive electricity that will never displace fossil fuel-fired base load electricity for the PJM system. Ohio electric ratepayers “lose” with this project. Ohio taxpayers “lose” with this project. Migrating birds and bats, waterfowl, and other Lake Erie wildlife “lose” with this project. People enjoying the use of Lake Erie and its shores “lose” with this project. The only party that “wins” with this project is publicly-subsidized foreign investor Fred. Olsen

Renewables USA LLC. The Proposed Project does not serve the public interest of Ohioans. It violates the Public Trust Doctrine.

4. The Application has redacted from it required information concerning capital and intangible costs, operation and maintenance expenses, present worth and annualized expenditures for operating and maintenance costs, and monthly delay costs. *See* OAC Rule 4906-4-06.

5. The Application fails to adequately document total decommissioning costs under O.A.C. 4906-04-06(F)(5), and fails to offer substantive evidence as to enforceable decommissioning commitments or contracts, bonds or surety or other financial assurance.

6. The Application's construction schedule for the Proposed Project is unrealistic -- especially in light of the OPSB's suspension of the procedural schedule in this case. Construction can occur only from mid-April to mid-October, thereby raising the specter of construction delays, adverse financial impacts, and possible risk to public funding grants. As noted above, Applicant has not even identified, much less implemented, any scientifically-valid pre-construction methodologies necessary to determine the probable environmental impacts of the Proposed Project. All of the following conditions must be met before Applicant can even begin construction of the Proposed Project: (a) Applicant must identify scientifically-sound pre- and post-construction methodologies for determining probable environmental impacts and submit the methodologies to the OPSB for approval -- which FWS correctly acknowledges first must be tested on land-based turbines to be scientifically-validated; (b) the OPSB must approve the proffered, pre-validated methodologies; (c) the approved methodologies must be implemented; (d) resulting scientifically-sound data must be presented the OPSB; (e) the OPSB must review the data; and (f) the OPSB must make findings and determinations as to the environmental impacts of the Proposed Project and that the Proposed Project represents the minimum adverse

environmental impact pursuant to R.C. 4906.10(A)(2) and (3). None of these required events has occurred. The proposed construction schedule cannot be met.

7. The Application concedes there is little empirical evidence or knowledge as to how offshore wind turbine noise may impact aquatic wildlife and ecosystems, or how such noise can be mitigated. Applicant has failed to properly address these issues.

8. The Application acknowledges that there are risks to the structures of the Proposed Project from ice cover, ice loads, and the formation of ice ridges in Lake Erie and in the Proposed Project area. However, the Application does not provide sufficient data from which the OPSB can find and determine that the structures can withstand such risks.

C. Intervention Standard

The Intervenors meet all requirements for intervention in these proceedings as set forth in R.C. 4903.08(A) and O.A.C. 4906-2-12(B)(1). The Board may consider the following when determining petitions to intervene:

- (a) The nature and extent of the person's interest;
- (b) The extent to which the person's interest is represented by existing parties;
- (c) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and
- (d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

O.A.C. 4906-2-12(B)(1). See also *In the Matter of the Application of Clean Energy Future—Lordstown, LLC*, No. 14-2322-EL-BGN, slip op. at 2, ¶5 (Ohio Power Siting Bd. July 28, 2015) (setting forth factors the Board considers in resolving motions to intervene); *In the Matter of the Application of Columbus Southern Power Co.*, No. 01-2153-EL-BTX, slip op. at 3, ¶8 (Ohio Power Siting Bd. Jan. 29, 2004) (same).

The Ohio Supreme Court has interpreted this rule as providing that “[a]ll interested parties may intervene in [Board] proceedings upon a showing of good cause.” *State, ex rel. Ohio Edison Co. v. Parrott*, 73 Ohio St.3d 705, 708 (1995) (citation omitted). Accordingly, the Board has granted numerous petitions to intervene filed by property owners whose property would be affected by a proposed project. See *In the Matter of the Application of Buckeye Wind LLC*, No. 13-360-EL-BGA, slip op. at 5-6, ¶¶12-14 (Ohio Power Siting Bd. Nov. 21, 2013) (granting motion of proposed intervenors who claimed that the wind project would have “potential impacts” on “their residences, land, roads, and community”).²

D. The Bratenahl Residents Are Entitled To Intervene

1. *The Intervenors Have Real And Substantial Interests In This Proceeding*

The Bratenahl Residents are long-time residents of Cuyahoga County. They have set forth above the important interests they are entitled to protect in this proceeding. Those interests are further delineated as follows:

- **Killing of Birds and Bats.** The wind turbines in the Proposed Project will kill substantial numbers of birds and bats. It is well established that wind farms cause large-scale kills of birds and bats, that risk assessments and post-construction mortality studies by wind industry-paid consultants systematically underestimate such bird and bat kills, and that Lake Erie is in the migratory path for hundreds of millions of birds. Applicant has not performed any scientifically-sound studies to justify its assertion that the risk to birds and bats is “low.” Furthermore, Applicant’s assertions of minimal environmental impacts ignore a considerable body of published research on migratory bird ecology

²See also *In the Matter of the Application of Champaign Wind, LLC*, No. 12-160-EL-BGN, slip op. 3-6, ¶¶19-23, 25 (Ohio Power Siting Bd. Aug. 2, 2012) (granting motion to intervene of “property owners who own real estate and reside within the footprint of the” wind turbine project and who “have a direct and substantial interest in [the] matter, in light of the potential visual, aesthetic, safety, and nuisance impacts of the wind project on their residences, land, and community”); *In the Matter of the Application of American Transmission Systems, Inc.*, No. 12-1636-EL-BTX, slip op. at 1-2, ¶¶3-6 (Ohio Power Siting Bd. May 21, 2014) (granting motions to intervene of property owner along the possible alternate route of a proposed transmission line).

from the community scale (e.g., birds cross Lake Erie in far greater numbers than suggested) to the individual bird scale (e.g., birds change altitudes throughout migration, exposing individuals to the RSZ of the wind turbines, even if an individual bird's average migration height is above the RSZ). An important example of ignored critical research is recent research that establishes that the Kirtland's warbler (a federally-listed and Ohio-listed endangered species) passes over Lake Erie, including through the Proposed Project area, during every spring and fall migration – rebutting the Applicant's assertions to the contrary. Moreover, DOE's draft Environmental Assessment is inadequate in critical aspects of its analysis. And as USFWS has notified DOE, a full Environmental Impact Statement is required for the Proposed Project.

- **Environmental Degradation.** The wind turbines in the Proposed Project will cause an aesthetic blot on the views in and around of Lake Erie.
- **Freshwater Species Habitat:** Lake Erie's shallow depth provides a unique habitat for freshwater species. The Proposed Project will negatively impact that unique habitat. In addition, it is not fully known how noise associated with the Proposed Project will impact aquatic wildlife.
- **Irregular Intermittency.** A fundamental problem with wind power is irregular intermittency – wind turbines do not produce electricity when the wind is not blowing. The problem of irregular intermittency is exacerbated by the fact that wind farms do not have the capability to effectively store the electricity that has been generated so that it can be distributed when the wind is not blowing. For these reasons, wind energy (a) is not sufficiently reliable to meet the cyclical demands of Ohio consumers for electricity; (b) is not economically competitive with other methods of electricity generation; and (c) requires duplicative fossil fuel-fired generation capacity due to the appropriately low (17.6%) capacity ascribed to wind-powered electricity for the PJM grid.
- **Subsidies to Out-of-State Producers.** The 130th Ohio General Assembly's Sub.S.B. 310 eliminated the requirement of former R.C. 4928.64 that electric distribution companies and electric services companies purchase one-half of their renewable energy resources from facilities located in Ohio. With the elimination of that in-state requirement, the cost of electricity from renewable resources paid by Ohio consumers may include costs for the development and operation of such facilities outside the state of Ohio. In short, Ohio consumers would be subsidizing the cost of renewable energy resources in other states. Such subsidies are not in the best interest of Ohio consumers.

- **Interference with Recreation and Enjoyment.** The construction and operation of the Proposed Project will interfere with the Bratenahl Residents' enjoyment and use of the Lake Erie and its shoreline, including recreational fishing and boating, as well as enjoyment of the unobstructed view of the horizon.
- **Increased Cost of Electricity.** The cost of electricity generated by the Proposed Project will be higher than competitively-bid electricity sold to the PJM system from other generators, notwithstanding the use of taxpayer funds to subsidize construction of the Project. Legislative mandates requiring the retail distribution of this higher-cost electricity will increase electricity rates for all consumers. This market distortion harms all ratepayers, and is a misuse of taxpayer funds.

2. *The Bratenahl Residents' Interests Are Not Already Adequately Represented.*

The Bratenahl Residents' interests are not adequately represented by the existing parties in this case. No existing party to this action has a direct interest in comprehensively addressing the effects that the Proposed Project will have with respect to: (1) preserving of affordable, reliable, safe, and fuel-secure electricity supplies for Ohio's consumers; (2) protecting birds and bats; (3) protecting the shallow-depth habitats for Lake Erie aquatic wildlife; and (4) preserving residents' enjoyment and recreation use of the Lake. Absent intervention, the Bratenahl Residents will have no effective means to protect their vital interests in this proceeding.

3. *The Bratenahl Residents Will Contribute To A Just And Expeditious Resolution Of Issues*

The Bratenahl Residents' intervention will contribute to a just and expeditious resolution of the issues in this proceeding. They have unique, independent perspectives on the implicated environmental and energy issues to offer the Board. Their participation is crucial to an informed, balanced, and fair disposition of the interests of all parties who will be affected by the OPSB's findings and determinations in this proceeding.

4. ***The Bratenahl Residents' Intervention Will Neither Delay This Proceeding Nor Prejudice Parties***

The Bratenahl Residents' intervention will neither unduly delay this proceeding nor unjustly prejudice any existing party. They will abide by all OPSB deadlines and present their evidence in a clear and concise manner.

For the foregoing reasons, the Bratenahl request the OPSB to grant this Petition To Intervene.

Respectfully submitted,

/s/ John F. Stock

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below via electronic mail this 22nd day of January, 2018.

/s/ John F. Stock
John F. Stock (004921)

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In

Case No(s). 16-1871-EL-BGN

Summary: Petition to Intervene of Bratenahl Residents W. Susan Dempsey, Robert M. Maloney, Gregory Binford, and Leon Blazey, Jr. electronically filed by John F Stock on behalf of W. Susan Dempsey and Robert M. Maloney and Gregory Binford and Leon Blazey, Jr.

Exponent

Exponent
149 Commonwealth Drive
Menlo Park, CA 94025

telephone 650-316-9100
toll-free 800-351-8072
www.exponent.com

September 11, 2017

John Stock, Esq.
Partner
Benesch, Friedlander, Coplan & Aronoff LLP
41 South High Street, Suite 2600
Columbus, OH 43215

Subject: Icebreaker Windpower
Exponent Project No. 1707425

Dear Mr. Stock:

Thank you for your interest in retaining Exponent, Inc. (Exponent) to provide services related to the above-referenced project. This letter presents our current understanding of the scope of services sought and the terms of the engagement.

Our scope of services is anticipated to include engineering consulting as requested on the above matter. This project shall be performed at the direction of Benesch Friedlander Coplan & Aronoff LLP, but is generally expected to include expert witness support related to the Icebreaker Windpower project including issues related to (1) the economic viability of a small wind turbine fleet; (2) the general economics of wind power generation in the United States; and (3) the impact of extensive wind farm development on current PJM baseload and price impact.

Exponent's services will be provided on a time-and-expense basis. Charges will include professional fees, equipment use fees, and other out-of-pocket expenses according to our *Schedule of Rates & Charges*, a copy of which is enclosed and made a part hereof by reference. Exponent charges \$430 per hour for my services in calendar year 2017. Other Exponent staff members will be utilized where appropriate.

Exponent's services are provided only in accordance with our *Terms and Conditions of Agreement*, a copy of which is enclosed and made a part hereof by reference. It is our understanding that Exponent's retention on this project is with Benesch, Friedlander, Coplan & Aronoff LLP, on behalf of Murray Energy Corporation (Murray Energy), and, as such, all charges (i.e., fees and expenses) incurred by Exponent on this project will be billed to your office but will be the responsibility of Murray Energy, independent of other parties/payees involved. Please verify the contact information for billing purposes in the table at the end of this letter. If it is not correct, please provide the updated information. For purposes of the *Terms and Conditions of Agreement*, "client" shall mean Murray Energy.

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John Stock, Esq.
September 11, 2017
Page 2

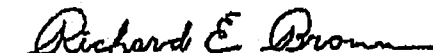
Based on the information you have provided, we have performed a conflict-of-interest check for the following parties:

- Murray Energy Corporation
- Bonheur ASA
- Lake Erie Energy Development
- LEEDCo
- Icebreaker Wind
- Fred.Olsen Renewables

Using this information, Exponent has determined that it does not currently have a conflict that would preclude us from assisting you in this matter. Please inform us as soon as possible if this list of parties is inaccurate or incomplete, and if other parties become involved as this matter proceeds.


This proposed retention letter is valid for 15 days from the date first set forth above. Please sign and return this letter if you would like us to proceed with this work. If you have any questions or require additional information, please do not hesitate to contact me at (303) 882-6469. We look forward to working with you.

Sincerely,


Richard E. Brown, Ph.D., P.E.
Principal Engineer & Practice Director

Enclosures (2)

Accepted by:


Authorized Signature

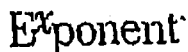
John F. Stock, Partner
Name and Title

Beresh, Friedland, Caplan & Cunniff, LLC
Organization

9/13/17
Date

John Stock, Esq.
September 11, 2017
Page 3

INVOICE TRANSMITTAL ADDRESS	
By default, Exponent will email invoices to the email address(es) listed below. Please verify the email address(es) as well as any reference information that should be contained on the invoice.	
If you wish to receive hard copies of invoices via US Mail, please check the box below and provide the address(es) to which the hard copies should be mailed.	
Invoice Reference Number(s):	
Name/Title	Email
John Stock, Esq. / Partner	jstock@Beneschlaw.com
Please send hard copy of invoices via US Mail: Yes <input type="checkbox"/> No <input type="checkbox"/>	
Physical address for invoicing:	
Other Notes:	



SCHEDULE OF RATES AND CHARGES

PROFESSIONAL FEES

Exponent charges its clients for services provided according to the qualifications and experience level of the individuals assigned to the client's project at each employee's specific current hourly rate. These rates are modified annually on or about January 1. Exponent provides the following staff classifications that designate relative experience, training, and accomplishment within a technical field, together with the range of hourly rates. Payment is required in U.S. dollars within 30 days after the date of the invoice, or interest charges may be applied.

Principal/Officer	Senior-level technical or management person, responsible for technical direction or general management or administration.	\$275-\$750
Senior Manager	Senior technical professional providing high-level or individual consulting assignments, or overall technical direction of projects, may have management responsibility for a technical field.	\$250-\$500
Manager	Senior technical professional providing high-level or individual consulting assignments or overall technical direction of projects.	\$200-\$425
Senior Engineer/ Scientists/Associate	Experienced technical professional skilled in planning, organizing, controlling, and executing complex, higher-order projects or assignments.	\$175-\$325
Engineer/Scientists/ Associate	Trained/degreed professional responsible for executing technical assignments in support of client projects.	\$150-\$275
Technical/Research Specialist	Personnel experienced in instrumentation, programming, testing, library science, or the development or execution of research methodologies in support of projects.	\$135-\$200
Technical/Research Assistant	Laboratory, data processing, engineering-graphics, engineering technician, or other personnel responsible for the execution of specialized tasks in support of projects.	\$90-\$150
Non-technical Assistant	Personnel who assist technical staff in various non-technical areas, including scheduling, report productions, communications, logistics, and project support.	\$ 75-\$125

TECHNICAL EQUIPMENT, SOFTWARE AND LAB CHARGES

Exponent personnel may utilize Exponent's technical equipment and software to assist them in the performance of client's project. Exponent charges an hourly or daily usage fee for selected equipment, software and labs (e.g., scanning electron microscope, finite element software and biomedical laboratory).

TRAVEL AND MEAL EXPENSES

Travel and meal expenses are charged at Exponent's cost. Local mileage is charged in accordance with I.R.S. guidelines. The most effective air travel for the project will be utilized and personnel below the Principal classification will charge coach fares.

OTHER PROJECT EXPENSES

Project expenses including materials, subcontractors and third-party vendors are charged at cost plus fifteen percent. If the client prefers to procure the project expenses directly to avoid the additional fifteen percent charge then notify Exponent at the initiation of the engagement. Consumable materials may be charged on an applied rate rather than an incurred cost basis.

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TERMS AND CONDITIONS OF AGREEMENT

Exponent

1. Work performed on a time-and-expenses basis will be billed in accordance with Exponent's most current Schedule of Rates and Charges. Work performed under a fixed-price arrangement will be billed at the agreed fixed amount. A payment in advance or a suitable retainer may be required from the client. Exponent will hold any retainer until the final invoice is prepared, at which time it will reconcile the client's account. Following Exponent's completion of work, the client is responsible for and may be charged for the storage and disposal of evidence, exemplars and samples. Exponent will charge taxes where applicable.
2. Invoices are typically rendered monthly or in accordance with the agreed upon payment schedule, and are due in U.S. dollars within 30 days of the date of the invoice. Exponent, without liability, may withhold delivery of reports and other data, and may suspend performance of its obligations to the client, pending payment of outstanding charges. Exponent reserves the right to decline further work with any client who has been delinquent in payment of Exponent's invoices.
3. Exponent will perform its services consistent with the professional skill and care ordinarily provided by professionals practicing in the same or similar locality under the same or similar circumstances. In the event that Exponent fails to meet the foregoing standard of care or that the client has any other claim, client's sole and exclusive remedy shall be limited to Exponent re-performing the work at Exponent's expense, or reimbursing the client up to the amount the client paid Exponent for the work. No other warranty, express or implied, is made concerning work performed under the agreement.
4. The client assumes full and complete responsibility for all uses and applications of Exponent's recommendations or work under this agreement, or failure to use recommendations or work, and agrees to indemnify and hold harmless Exponent, its affiliates, officers, directors, employees, agents, and stockholders against any and all liabilities, damages, losses, claims, demands, actions, causes of action, and costs including attorney's fees and expenses resulting from the death or injury to any person or damage to any property or any other alleged or actual damages resulting from the aforementioned use, application, or nonuse of Exponent's recommendations or work under this agreement.
5. In no event shall Exponent, its affiliates, officers, directors, employees, agents, or stockholders be liable for any incidental or consequential damages.
6. Exponent will hold in confidence all information provided by the client that the client designates and/or marks as confidential or proprietary. If Exponent and the client have entered into a separate non-disclosure agreement, it is deemed incorporated herein. All deliverables and any improvements to the client's processes or products arising from this agreement shall be and remain the property of client; however, Exponent has a right to retain a copy of such deliverable(s). Exponent shall retain all rights, title, and interest in and to its proprietary information (along with any modifications or improvements to such information), including, but not limited to Exponent's know-how, methodologies, techniques, processes, tools, test fixtures, technologies, trade secrets, software, data, databases, algorithms, source code, computational engines, logic formulas, non-interface worksheets, macros, and other materials used by Exponent in connection with providing its services.
7. Anybody required to be present at Exponent's laboratories for the project, including other parties and the like, will be required to sign an agreement that contains confidentiality obligations and a general release of claims for injuries or damages to property related to the visit.
8. Client understands that evidence, materials, test articles or the like ("Articles") may be damaged or destroyed during testing and as such Exponent is not responsible for any loss or damage thereto. The client shall bear the risk of loss of the Articles while they are in transit. Notwithstanding any language to the contrary herein, should Exponent be obligated to replace the Articles, the cost of such replacement shall be its fair market value and not any implicit value. Exponent, unless other specific arrangements are made, will maintain technical files and evidence for 30 days after the completion of work. Exponent will retain financial records according to I.R.S. requirements, but in no event less than 1 year after completion of the work.
9. Client shall not use Exponent's (or any of its affiliates' or its personnel's) name(s), trade names, service marks, trademarks, trade dress, logos, symbols, or the like in any form for advertising, publicity, marketing, or in any way that could be construed as endorsement or promotion and the like without the prior written consent of Exponent in each instance.
10. This agreement is solely between, and may only be enforced by, Exponent and the client, and this agreement shall not create or be construed to create any third party rights, obligations, or liabilities including, but not limited to, affiliates, employees, contractors, stockholders, licensees, or the like. Any deliverables, recommendations, or service provided by Exponent shall be for the client's use only. Exponent's services are expressly limited to the terms herein and are not modified or supplemented by terms from the client's purchase order. Exponent will reference the client's purchase order for billing purposes only.
11. Upon receipt of written notice from the client, Exponent will terminate work under this agreement. Work under a fixed-price agreement that is terminated before completion will be billed on a percentage of completion basis. Exponent may terminate work under this Agreement only for cause. "Cause" includes, but is not limited to, development of a material conflict of interest, delinquency in payment, judicially required participation in onerous discovery or other legal process outside the intended scope of the work, or the presence of circumstances beyond Exponent's control, such as natural disasters or government intervention. Exponent shall not be liable for any delay or failure to perform resulting from unforeseen causes beyond its reasonable control.
12. If Exponent is required to testify or to produce information regarding work under this agreement in any third party litigation, including but not limited by subpoena or court order, the client agrees to provide counsel of its choosing and to pay Exponent's reasonable time and expenses, including attorney's fees associated with responding to such request. In the event of any such request, Exponent will promptly notify the client to enable the client to object to any such testimony or production. This paragraph is not intended to apply to claims between Exponent and the client.
13. This agreement shall be construed, and the legal relations between the parties hereto shall be determined, in accordance with the internal laws of the state of California, without regard to the conflicts of laws principles of such state. The parties to this agreement consent to the jurisdiction of any state or federal court located in San Francisco, California. The prevailing party in any action shall recover from the losing party its reasonable attorney's fees and costs of suit incurred in addition to any other relief granted.

Rev. 01/03/15

BR000019

EXHIBIT B

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)
Paulding Wind Farm III LLC to Amend)
Phase II of the Certificate of) Case No. 15-2030-EL-BGA
Environmental Compatibility and Public)
Need Issued in Case No. 10-0369-EL-BGN)

In the Matter of the Joint Application of)
Paulding Wind Farm LLC and Paulding)
Wind Farm III LLC to Amend the) Case No. 15-2031-EL-BGA
Certificate of Environmental Compatibility)
and Public Need Issued in Case No. 09-)
0980-EL-BGN)

**PETITION OF THE CAMPAIGN FOR AMERICAN AFFORDABLE AND RELIABLE
ENERGY TO INTERVENE**

Pursuant to R.C. 4906.08(A)(3) and O.A.C. 4906-2-12, the Campaign For American Affordable And Reliable Energy, LLC ("CAARE"), hereby petitions the Ohio Power Siting Board (the "OPSB") for an order granting its intervention as a party in this proceeding.

This Petition to Intervene is supported by the Memorandum In Support set forth below.

Respectfully submitted,

/s/ John F. Stock
John F. Stock (0004921)
Orla E. Collier III (0014317)
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
41 S. High St., 26th Floor
Columbus, Ohio 43215
(614) 223-9300
FAX: (614) 223-9330

*Attorneys for the Campaign For American
Affordable And Reliable Energy, LLC*

MEMORANDUM IN SUPPORT OF
PETITION TO INTERVENE OF CAARE

On August 28, 2010, the OPSB issued an Opinion, Order, and Certificate in OPSB Case No. 09-0980-EL-BGN (the "Timber Road I Case"), pursuant to which the OPSB granted to Paulding Wind Farm LLC a certificate of environmental compatibility and public need to construct a wind turbine facility in Paulding County comprised of, *inter alia*, 32 wind turbines, access roads, a collection line system, transformer substation, and related facilities and equipment (together, the "Timber Road I Project").

On November 18, 2010, the OPSB issued an Opinion, Order, and Certificate in OPSB Case No. 10-0369-EL-BGN (the "Timber Road II Case"), pursuant to which the OPSB granted to Paulding Wind Farm II LLC a certificate of environmental compatibility and public need to construct a wind turbine facility in Paulding County comprised of, *inter alia*, 98 wind turbines, access roads, a collection line system, transformer substation, and related facilities and equipment (together, the "Timber Road II Project").

On February 28, 2011, the OPSB issued an Order on Certificate Amendment in Case No. 10-3128-EL-BGA to amend the Timber Road II Project certificate of environmental compatibility and public need. By that Order, the OPSB permitted Paulding Wind Farm II LLC and Paulding Wind Farm III LLC to assign 37 of the 98 certificated wind turbines (now reduced to 95 turbines) in the Timber Road II Case to Paulding Wind Farm III LLC. In addition, the Timber Road II Project was divided into two phases: Phase I, consisting of 55 turbines, to be built by Paulding Wind Farm II LLC, and Phase II, consisting of 37 turbines, to be built by Paulding Wind Farm III LLC.

In July 2011, construction of the 55 turbines for Phase I of Timber Road II Project was completed and that phase became operational.

On December 9, 2015, Paulding Wind Farm III LLC filed an application to amend the certificate granted in the Timber Road II Case (No. 10-0369) for Phase II of Timber Road II Project. That application is the subject of current Case No. 15-2030-EL-BGA.

On December 9, 2015, Paulding Wind Farm LLC and Paulding Wind Farm III LLC filed an application to amend the certificate granted in the Timber Road I Case (No. 09-0980). That application is the subject of current Case No. 15-2031-EL-BGA.

Pursuant to these current applications to amend, Paulding Wind Farm LLC and Paulding Wind Farm III, LLC seek to, *inter alia*, obtain OPSB approval for revised grid interconnection points, access roads, collection line system designs, and to add an additional turbine model for the Timber Road I Project and Phase II of the Timber Road II Project (together, the "Amended Timber Road Projects").

CAARE seeks to intervene in this these cases, Nos. 15-2030 and 15-2031, to oppose the requested amendments. CAARE is a non-profit corporation formed under the laws of the state of Ohio. CAARE's principal office is located in Cleveland, Ohio.

CAARE's purposes include the following:

- To meet the need for consistent advocacy for affordable and reliable American energy;
- To protect, preserve and promote America's affordable and reliable coal-fired electricity generation, transmission and distribution and the Coal Industry that supports it, including coal production, transportation and supply and labor;
- To challenge unworkable and artificial renewable energy portfolio standards and financial and tax incentives for alternative energy sources on both a state and federal level;
- To participate in state and federal siting certification, licensing and permitting proceedings to ensure that alternate energy sources fully comply with all applicable standards and regulations including impact on the community, environment and natural wildlife resources;

- To participate in state and federal legislative and rule-making proceedings that impact America's energy future, environment and natural wildlife resources. To support and promote public awareness and education concerning America's energy future, environment and natural wildlife resources.

CAARE's membership includes a number of operating coal production, transportation and logistics and manufacturing companies located in Ohio, West Virginia and the region. To the extent located in Ohio, these companies are property owners of facilities in Ohio, Ohio taxpayers, and Ohio electric ratepayers served by electric distribution companies in Ohio.

In compliance with R.C. 4906.08(A)(3) and O.A.C. 4906-2-12(B)(1), CAARE submits that it has real and substantial interests in these proceedings and that disposition of these proceedings may, as a practical matter, impair or impede its ability to protect those interests.

CAARE further submits that it meets all requirements for intervention in this proceeding as set forth in R.C. 4903.08(A) and O.A.C. 4906-2-12(B)(1). The Board may consider the following when determining petitions to intervene:

- (a) The nature and extent of the person's interest;
- (b) The extent to which the person's interest is represented by existing parties;
- (c) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and
- (e) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

O.A.C. 4906-2-12(B)(1). See also *In the Matter of the Application of Clean Energy Future—Lordstown, LLC*, No. 14-2322-EL-BGN, slip op. at 2, ¶5 (Ohio Power Siting Bd. July 28, 2015) (setting forth factors Board considers in resolving motions to intervene); *In the Matter of the Application of Columbus Southern Power Co.*, No. 01-2153-EL-BTX, slip op. at 3, ¶8 (Ohio Power Siting Bd. Jan. 29, 2004) (same).

The Ohio Supreme Court has interpreted this rule as providing that "[a]ll interested parties may intervene in [Board] proceedings upon a showing of good cause." *State, ex rel. Ohio Edison Co. v. Parrott*, 73 Ohio St.3d 705, 708 (1995) (citation omitted).

1. ***CAARE Has A Real And Substantial Interest In This Matter***

The construction of the Amended Timber Road Projects, and the integration of those projects into the PJM interconnection grid, present substantial problems for the preservation of affordable, reliable, safe, and secure supplies of electricity for all consumers in Ohio, including, but not limited to:

- **Irregular Intermittency.** A fundamental problem with wind power is irregular intermittency – wind turbines do not produce electricity when the wind is not blowing. The problem of irregular intermittency is exacerbated by the fact that wind farms do not have the capability to effectively store the electricity that has been generated so that it can be distributed when the wind is not blowing. For these reasons, wind energy is not (a) sufficiently reliable to meet the cyclical demands for energy of Ohio's electricity consumers; and (b) economically competitive with other methods of electricity generation that power the PJM interconnection grid.
- **Destabilization of the PJM Grid.** The irregular and unexpected surges of electricity into the PJM interconnection grid caused by wind turbine facilities destabilize the grid. Surges of electricity caused by wind turbine facilities have been known to cause power outages in electric grids.
- **Subsidies to Out-of-State Producers.** The 130th Ohio General Assembly's Sub.S.B. 310 eliminated the requirement of former R.C. 4928.64 that electric distribution companies and electric services companies purchase one-half of their renewable energy resources from facilities located in Ohio. With the elimination of that in-state requirement, the cost of electricity from renewable resources paid by Ohio consumers may include costs for the development and operation of such facilities outside the state of Ohio. In short, Ohio consumers would be subsidizing the cost of renewable energy resources in other states. Such subsidies are not in the best interest of Ohio consumers.
- **Protection of Wildlife.** The sixty-nine (69) wind turbines in the Amended Timber Road Projects threaten protected migratory birds and endangered bird and bat species and their habitat subject to the protection of the federal Migratory Bird Treaty Act and the Endangered Species Act. It is

well established that wind farms can adversely impact protected species and their habitat.

- **Damage to Infrastructure.** The construction and operation of the Amended Timber Road Projects will adversely impact the roads and other public infrastructure in the areas surrounding those projects and in other areas of the state.
- **Environmental Degradation.** The wind turbines in the Amended Timber Road Projects will cause substantial noise pollution and changes in barometric pressure that are likely to have adverse effects for protected wildlife species as well as human residents. Moreover, the proposed substantial number of wind turbines will cause an adverse aesthetic impact on the rural landscape of Paulding County.
- **Community Impacts.** The construction and operation of the Amended Timber Road Projects at the sites will adversely impact property values in the area, and will interfere with enjoyment and use of that property.

2. *CAARE's Interests Are Not Already Adequately Represented*

CAARE's interests are not adequately represented by the existing parties in these cases. No existing party to these actions has a direct interest in comprehensively addressing the effects that the construction and operation of the Amended Timber Road Projects will have for the preservation of affordable, reliable, safe, and secure electricity supplies for Ohio's consumers. It is the very purpose of non-profit CAARE to advocate for protecting such energy resources in an informed and independent manner. CAARE has a vital interest in seeking appropriate protection for Ohio's energy resources for Ohio's consumers. Absent intervention, CAARE will have no effective means to protect their interests in this matter.

3. *CAARE Will Contribute To A Just And Expeditious Resolution Of Issues*

CAARE's intervention will contribute to a just and expeditious resolution of the issues in these proceedings. CAARE has a unique, independent perspective on the implicated energy issues to offer the Board, which will prove advantageous to an informed, fair disposition in these proceedings.

4. ***CAARE's Intervention Will Neither Delay These Proceedings Nor Prejudice Parties***

CAARE's intervention will neither unduly delay these proceedings nor unjustly prejudice any existing party. CAARE will abide by all Board deadlines in these cases and present its information in a clear and succinct manner. No date has been set for any hearing nor has any specific deadline been established by the Board in these proceedings. This motion to intervene is timely and will not unduly prejudice any existing party.

"Regarding procedural matters, the Power Siting Board 'has the discretion to decide how * * * it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.'" *In re Application of American Transmission Systems, Inc.*, 125 Ohio St.3d 333, 336, 2010-Ohio-1841 at ¶17 (citations omitted). R.C. 4906.08 generally governs the right to intervene in proceedings before the Power Siting Board.¹

The Power Siting Board has allowed intervention for a variety of reasons. In several cases, the Board granted motions to intervene where the proposed intervenors have argued that the proposed construction and operation of wind turbines may affect the operation of their businesses:

- *In the Matter of the Application of Hardin Wind Energy LLC*, No. 11-3446-EL-BGA, slip op. at 2-3, ¶¶8-11 (Ohio Power Siting Bd. July 29, 2011) (granting the motions to intervene of a "member-owned distribution electric utility" and a "wireless communications company" operating in the county in which the project

¹"Pursuant to R.C. 4906.12, [the Supreme Court] must apply the same standard of review to Power Siting [Board] determinations as we apply to orders by the Public Utilities Commission.' R.C. 4903.13 applies to board proceedings pursuant to R.C. 4906.12 and provides that an order 'shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable.'" *In re Application of American Transmission Systems, Inc.*, 125 Ohio St.3d 333, 336, 2010-Ohio-1841 at ¶17 (citations omitted).

was to be sited and which asserted that the proposed wind turbines may interfere with microwave radio signals used in their businesses).

- *In the Matter of the Application of Buckeye Wind LLC*, No. 08-666-EL-BGN, slip op. at 1, ¶¶2 (Ohio Power Siting Bd. Oct. 30, 2009) (granting motion to intervene of the Champaign Telephone Company which asserted that “the proposed location of wind turbines in Champaign County may interfere with broadband and point-to-point signals sent to provide digital subscriber line (DSL) service from the Telephone Company’s tower”).
- *In the Matter of the Application of Buckeye Wind LLC*, No. 08-666-EL-BGN, slip op. at 1-2, ¶¶3 & 5 (Ohio Power Siting Bd. Sept. 1, 2009) (granting motions to intervene of the owner and operator of “a country club in the area of Champaign County where the Buckeye wind project is proposed to be located” and which “wind project may create temporary or permanent disruption in golf course operations and may limit access to the property by its club members”).
- *In the Matter of the Application of the City of Hamilton and American Municipal Power, Inc.,* Nos. 10-2439-EL-BSB & 10-2440-EL-BTX, slip op. at 2, ¶5 (Ohio Power Siting Bd. Oct. 4, 2011) (granting motion to intervene of farmer who asserted that construction of two transmission line towers on his property would “interfere with his farming and [topsoil sale] business operation”).
- *In the Matter of the Application of Champaign Wind, LLC*, No. 12-160-EL-BGN, slip op. 2-3, ¶¶5-6, 8 (Ohio Power Siting Bd. Oct. 22, 2012) (granting motion to intervene of “member-owned electric distribution cooperative” which asserted that the “proposed turbines will interfere with its microwave systems”).
- *In the Matter of the Application of American Transmission Systems*, No. 04-264-EL-BTX, slip op. at 1-2, ¶¶4-5 (Ohio Power Siting Bd. Nov. 23, 2004) (granting motion to intervene of the owner and operator of a landfill because the location of the proposed transmission line was in an area where the Ohio EPA had previously issued a permit for landfill expansion).

The Board has also regularly allowed nonprofit organizations to intervene in its proceedings. For example, the Board has granted numerous motions of the Ohio Farm Bureau Federation to intervene in cases involving wind energy projects. The Federation is a statewide non-profit organization with resident, farm, and small business members in each of the state’s counties, and the Federation asserts that its local members “have an interest in effective wind energy development, wind leasing agreements, and assurances that project construction activities adhere to applicable soil and water conservation and air quality standards, as well as other

environmental considerations." *In the Matter of the Application of 6011 Greenwich Windpark, LLC*, No. 13-990-EL-BGN, slip op. at 1-2, ¶¶3-4 (Ohio Power Siting Bd. March 10, 2014).²

For the foregoing reasons, CAARE requests the Board to grant this Motion To Intervene.

Respectfully submitted,

/s/ John F. Stock

John F. Stock (0004921)

Orla E. Collier III (0014317)

BENESCH FRIEDLANDER COPLAN

& ARONOFF LLP

41 S. High St., 26th Floor

Columbus, Ohio 43215

(614) 223-9300

*Attorneys for Campaign for American
Affordable And Reliable Energy*

²See also *In the Matter of the Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 1-2, ¶¶2-4 (Ohio Power Siting Bd. May 3, 2011); *In the Matter of the Application of Hardin Wind LLC*, No. 13-1177-EL-BGN, slip op. at 1-2, ¶¶2-4 (Ohio Power Siting Bd. Aug. 26, 2013); *In the Matter of the Application of Buckeye Wind LLC*, No. 08-666-EL-BGN, slip op. at 2-3, ¶¶4-5, 7 (Ohio Power Siting Bd. July 31, 2009); *In the Matter of the Application of JW Great Lakes Wind, LLC*, No. 09-277-EL-BGN, slip op. at 5, ¶8 (Ohio Power Siting Bd. Sept. 18, 2009); *In the Matter of the Application of Paulding Wind Farm, LLC*, No. 09-980-EL-BGN, slip op. at 5, ¶8 (Ohio Power Siting Bd. Feb. 23, 2010); *In the Matter of the Application of Hog Creek Wind Farm, LLC*, No. 10-654-EL-BGN, slip op. at 3, ¶9 (Ohio Power Siting Bd. Sept. 21, 2010); *In the Matter of the Application of Champaign Wind, LLC*, No. 12-160-EL-BGN, slip op. 5-6, ¶¶24-25 (Ohio Power Siting Bd. Aug. 2, 2012); *In the Matter of the Application of Northwest Ohio Wind Energy*, No. 13-197-EL-BGN, slip op. at 4, ¶¶12-13 (Ohio Power Siting Bd. Aug. 22, 2013).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion To Intervene was served, via regular U.S. mail, postage prepaid, this 28th day of January, 2016, upon all parties listed in the attached Exhibit A.

/s/ John F. Stock
John F. Stock

EXHIBIT A

Chad A. Endsley
Chief Legal Counsel
Leah F. Curtis
Amy M. Milam
Ohio Farm Bureau Federation
280 North High Street
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Columbus, OH 43218-2383

Debra Hight
Public Utilities Commission of Ohio
180 E. Broad Street
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Michael J. Settineri
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In

Case No(s). 15-2030-EL-BGA

Summary: Petition Petition of the Campaign for American Affordable and Reliable Energy to Intervene electronically filed by John F Stock on behalf of Campaign for American Affordable and Reliable Energy

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of)	
Paulding Wind Farm and Paulding Wind)	
Farm III, LLC for Amendments to Their)	Case No. 15-2030-EL-BGA
Certificates to Install and Operate a)	Case No. 15-2031-EL-BGA
Wind-Powered Electric Generation)	
Facilities in Paulding County, Ohio.)	

ENTRY

The administrative law judge finds:

- (1) On August 23, 2010, in *In re Paulding Wind Farm LLC*, Case No. 09-980-EL-BGN (09-980), the Board issued an Opinion, Order, and Certificate granting the application of Paulding Wind Farm LLC for a certificate to construct *Timber Road I*, a wind-powered electric generating facility in Paulding County, Ohio, consisting of up to 35 turbine sites with a combined generation capacity of 48.6 megawatts (MW).
- (2) On November 18, 2010, in *In re Paulding Wind Farm II LLC*, Case No. 10-369-EL-BGN (10-369), the Board issued an Opinion, Order, and Certificate granting the application of Paulding Wind Farm II LLC for a certificate to construct *Timber Road II*, a wind-powered electric generating facility in Paulding County, Ohio, consisting of up to 98 turbine sites with a combined generation capacity of 150.4 MW.
- (3) On February 28, 2011, in *In re Paulding Wind Farm II LLC*, Case No. 10-3128-EL-BGA (10-3128), the Board issued an Order on Certificate Amendment permitting Paulding Wind Farm II LLC to amend the certificate granted in 10-369. Changes included an increase the hub height of the approved Vestas V100 1.8 MW turbine model from 262.5 feet to 311.7 feet, the addition of a new permanent meteorological tower, and the removal of three of the previously approved meteorological tower locations.
- (4) On February 28, 2011, in 10-369, the Board authorized the bifurcation of the project approved in 10-369 into two phases. As a result of this bifurcation, Phase I of the project continues to be known as *Timber Road II*. It consists of 55 operational

turbines and began commercial operation in July 2011. Phase II of the project approved in 10-369 is now known as the *Timber Road III*. It consists of 37 unconstructed turbine locations and has been assigned to Paulding Wind Farm III LLC.

- (5) On December 9, 2015, in *In re Paulding Wind Farm III LLC*, Case No. 15-2030-EL-BGA (15-2030), Paulding Wind Farm III LLC filed an application to amend the certificate, first issued in 10-369 and later amended in 10-3128, which authorizes *Timber Road III*.
- (6) On December 9, 2015, in Case No. 15-2031-EL-BGA (15-2031), Paulding Wind Farm LLC and Paulding Wind Farm III LLC (Applicants) filed a joint application to amend the certificate, issued in 09-980, which authorizes *Timber Road I*. The project areas involved in 15-2030 and 15-2031 partially overlap and are both located entirely in Paulding County, Ohio. On February 17, 2016, the Applicants supplemented their filings in both 15-2030 and 15-2031 to modify the layout of several collection lines and access roads.
- (7) R.C. 4906.07(B) provides that the Board shall hold a hearing on an application for an amendment of a certificate, if the proposed change would result in a material increase in any environmental impact of the facility, or a substantial change in the location of all or a portion of the facility. Ohio Adm.Code 4906-5-10(B)(1)(a) provides that the administrative law judge (ALJ) shall schedule a hearing in an amendment case, if the proposed change would result in any significant adverse environmental impact of the certified facility or a substantial change in the location of all or a portion of such certified facility.
- (8) Staff filed a combined investigative report (Staff Report) for both 15-2030 and 15-2031 on March 23, 2016. In its report, Staff states it has reviewed the applications and notes that the Applicants have proposed: (a) changes to access roads; (b) changes to collection lines; (c) establishing a new transmission line interconnection point; (d) adding the Gamesa G114 turbine model to the list of approved turbine models for the two projects; (e) the removal of four specific previously approved *Timber Road I* turbine locations and one specific previously approved *Timber Road III* turbine location; (e) notice that four

turbine sites previously approved for both projects will be dropped by one but exclusively retained by the other of the two projects; (f) a proposed relocation of the collector substation serving both projects; and (g) increasing the combined facility output by 0.8 MW. (Staff Report at 3-4.)

Staff finds that the addition of the Gamesa G114 turbine model would not impact the location of any facilities and would not result in a material increase in environmental impact. Additionally, Staff determines that neither the increase in nameplate capacity nor the point interconnection result in a substantial change in the location of all or a portion of the certified facilities and would not result in a material increase in environmental impact. With respect to the proposed modifications to the access roads, collection lines, and the relocation of the collection substation, Staff also finds that the changes to these facilities would pose no material increase in environmental impact. However, Staff finds that the proposed relocation and addition of the access roads, collection lines, and the relocation of the collection substation constitutes substantial changes in the locations in these portions of the certified facilities. Staff recommends that the Board approve the applications as proposed, provided that the certificates include the conditions specified in the opinions, orders, and certificates issued in 09-980, 10-369, and 10-3128, including the Applicants' compliance with the applicable statutory setback requirements. (Staff Report at 10-11.)

- (9) As stated previously, R.C. 4906.07(B) sets forth two separate and distinct reasons that would require the Board to hold a hearing on an amendment application; the first being that the proposed amendment would result in a material increase in any environmental impact of the facility. The administrative law judge (ALJ) finds that none of the proposed changes in the amendment applications would result in a material increase in any environmental impact of the facilities. Therefore, R.C. 4906.07(B) does not require a hearing with regard to environmental impact of the facilities, as amended.

The second reason necessitating a hearing is if there is a substantial change in the location of all or a portion of the facility. The ALJ finds that the following four proposed changes in the amendment application do not result in a

substantial change in the location of all or a portion of the facilities: (a) adding the Gamesa G114 turbine model to the list of approved turbine models for the two projects; (b) eliminating four specific previously approved *Timber Road I* turbine locations and one specific previously approved *Timber Road III* turbine location; (c) notice that four turbine sites previously approved for both projects will be dropped by one but exclusively retained by the other of the two projects; and (d) increasing the combined facility output by 0.8 MW. Therefore, R.C. 4906.07(B) does not require a hearing with regard to these four changes.

However, the ALJ finds that the following four proposed changes in the amendment application require a hearing under R.C. 4906.07(B), because they entail a substantial change in the location of all or a portion of the facilities: (a) the proposed modification of access roads; (b) the proposed modification of collection lines; (c) the proposed relocation of the collector substation, and (d) establishing the proposed new transmission line interconnection point. Accordingly, a hearing should be held solely to consider the portion of the amendment application related to these four changes under the provision in R.C. 4906.07(B), which requires a hearing if there is a substantial change in the location of all or a portion of the certified facility.

- (10) In order to facilitate the Board's timely consideration of the applications, parties should adhere to the following procedural schedule:
 - (a) April 22, 2016 - Deadline for the filing of all direct testimony.
 - (b) The hearing shall commence on April 28, 2016, at 11:00 a.m., at the offices of the Public Utilities Commission of Ohio, Hearing Room 11-D, 180 E. Broad Street, Columbus, Ohio.
- (11) On December 21, 2015, the Ohio Farm Bureau Federation (OFBF) filed a motion to intervene in this case. OFBF states that it maintains a non-profit organization representing agricultural interests with over 190,000 member families statewide, including over 490 families in the Paulding County

Farm Bureau. OFBF members are involved in farm and agribusiness activities and have a keen interest in effective wind energy development. OFBF claims that it has extensive experience gathering input, addressing the needs of and representing the local interests of farm, small business, and rural residents concerning energy development and, as such, brings a perspective that cannot be provided by another existing party. This perspective includes pursuing adherence to procedures ensuring soil and water conservation and air quality, environmental considerations such as setbacks, noise standards, and shadow flicker, and enhancements to local commerce and economic development. On a state level, OFBF was involved with the Ohio Department of Development – Ohio Wind Working Group representing farm, small business, and residential energy consumers. OFBF explains that it was involved in several wind farm certification cases, including as a party of record in 09-980, 10-369, and 10-3128. As such, OFBF fully understands and appreciates the rules governing the Board evaluation process. It also claims that its participation will not cause undue delay or unjustly prejudice any existing party and will contribute to the just and quick resolution of issues and concerns raised.

- (12) Upon review, the ALJ finds that the motion to intervene filed by the OFBF meets the requirements for intervention set forth in R.C. 4906.08 and Ohio Adm.Code 4906-2-12, and its motion to intervene is unopposed. Accordingly, the ALJ finds that the OFBF should be granted intervention in this case.
- (13) On January 28, 2016, the Campaign for American Affordable and Reliable Energy, LLC (CAARE) filed a petition for leave to intervene in both 15-2030 and 15-2031, together, certificate amendment applications involving what CAARE calls “the Amended Timber Road Projects.” CAARE describes itself as a non-profit Ohio corporation, headquartered in Cleveland, whose purposes, among other things, include: (a) to meet the need for consistent advocacy for affordable and reliable American energy; (b) to preserve and protect the coal industry in its support of coal production, transportation and supply and labor; (c) to challenge renewable portfolio standards and financial and tax incentives for alternative energy sources on both a state and federal level; and (d) to participate in state and federal siting certification proceedings to ensure compliance

with all applicable standards and regulations. CAARE membership includes a number of operating coal production, transportation and logistics, and manufacturing companies located in Ohio, West Virginia, and the region. To the extent located in Ohio, these companies are property owners of facilities in Ohio, Ohio taxpayers, and Ohio electric ratepayers served by electric distribution companies in Ohio.

- (14) Describing what it states to be its real and substantial interest in these two cases, CAARE submits the construction of the Amended Timber Road Projects and integration of those projects into the PJM interconnection grid, present substantial problems for the preservation of affordable, reliable, safe, and secure supplies of electricity for all consumers in Ohio. Additionally, CAARE seeks to intervene to address environmental factors such as wildlife and community impacts associated with wind turbines.
- (15) On April 11, 2013, the Applicants filed a Memorandum Contra in response to CAARE's petition to intervene. The Applicants assert that intervention should be denied because CAARE has stated no plausible interest in these proceedings which would warrant intervention. The Applicants aver that CAARE has not shown that any of its members own or operate a facility in the project areas in Paulding County that will be impacted by the amendments proposed in 15-2030 and 15-2031. Moreover, say the Applicants, CAARE raises no issues regarding the specific, limited scope of the amendments proposed in those two cases, but instead, allege interests in the Timber Road Wind Farm projects as a whole and wind farms generally. The Applicants submit that these issues were thoroughly evaluated and addressed in the Board's issuance of the certificates for the Timber Road I Wind Farm and the Timber Road II Wind Farm. Finally, to the extent that CAARE claims any local interest in the proposed limited amendments, those interests will be adequately represented by the OFBF given its involvement in the community with farmers, small businesses, and residents, including over 490 member families of the Paulding County Farm Bureau.
- (16) CAARE filed a response to the Applicants' memorandum contra on February 16, 2016. CAARE suggests that its interests are similar to the OFBF which has been granted intervention in

numerous cases before the Board. CAARE also seeks to intervene to address the revised interconnection points, access roads, and collection line system designs as these proposed amendments will have a direct and substantial impact on the roads and other infrastructure, as well as wildlife, in the areas surrounding the projects.

- (17) Upon review, the ALJ finds that CAARE's petition to intervene in 15-2030 and 15-2031 should be denied because CAARE has failed to show that it, or any of its members, have an interest that relates or will be impacted by the specific issues at stake in these two certificate amendment applications in Benton and Harrison Townships, Paulding County, Ohio. The Board has already addressed many of CAARE's stated interests in the original certification dockets involving *Timber Road I*, *Timber Road II*, and *Timber Road III*, and no showing has been made by CAARE, here, that any of its other stated interests, not previously addressed, belong within the scope of the two certificate amendment cases now before the Board, namely, 15-2030 and 15-2031. CAARE's position is distinguishable from the OFBF as the OFBF stated that it has over 490 families in the Paulding County Farm Bureau and on a local level OFBF field staff and volunteer leaders with the Paulding County Farm Bureau continue to work with wind farm developers, government leaders, and interested community stakeholders to explore how wind energy development should be addressed at the local level. As to the impact of the proposed amendments on the roads, infrastructure, and wildlife, the ALJ notes that the proposed modifications to the access roads, collection lines, and collector substation are occurring on land that is part of the wind farm footprint that was already addressed in the original certification dockets involving *Timber Road I*, *Timber Road II*, and *Timber Road III*. Additionally, issues concerning roads, infrastructure, and wildlife are already adequately addressed by the OFBF, an entity with local interests through its member families in Paulding County. Therefore good cause has not been shown for granting intervention, and accordingly, it is denied, in both 15-2030 and 15-2031.

It is, therefore,

ORDERED, That a hearing be held and the procedural schedule for this proceeding be adopted as set forth in findings (9) and (10). It is, further,

ORDERED, That OFBF's motion to intervene be granted in accordance with finding (12). It is, further,

ORDERED, That CAARE's motion to intervene is denied in accordance with finding (17). It is, further,

ORDERED, That a copy of this Entry be served upon all interested persons of record.

THE OHIO POWER SITING BOARD

/s/ Daniel E. Fullin

By: Daniel E. Fullin
Administrative Law Judge

JRJ/dah

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in

Case No(s). 15-2030-EL-BGA, 15-2031-EL-BGA

Summary: Administrative Law Judge Entry ordering a hearing be held and the procedural schedule for this proceeding be adopted as set forth in findings (9) and (10); that OFBF's motion to intervene be granted in accordance with finding (12); and that CAARE's motion to intervene is denied in accordance with finding (17) - electronically filed by Debra Hight on behalf of Daniel E. Fullin, Administrative Law Judge.

EXHIBIT C

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of
Black Fork Wind Energy, LCC
Regarding its Certificate of
Environmental Compatibility and
Public Need Issued in Case
No. 10-2865-EL-BGN

Case No.: 18-1134

On Appeal from the Ohio Power Siting
Board, Case No. 17-1148-EL-BGA

**NOTICE OF APPEAL OF INTERVENORS-APPELLANTS GARY J. BIGLIN, KAREL
A. DAVIS, BRETT A. HEFFNER, ALAN PRICE, CATHERINE PRICE,
MARGARET RIETSCHLIN, AND JOHN WARRINGTON,**

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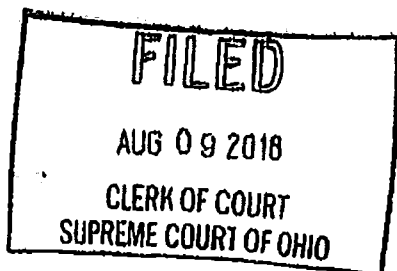
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Pursuant to R.C. 4903.11, 4903.13, and 4906.12, Intervenor-Appellants Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington (collectively, "Appellants") hereby give notice of their appeal to the Ohio Supreme Court from the following attached orders of Appellee Ohio Power Siting Board ("Board") in Case Number 17-1148-EL-BGA: (1) *Order on Certificate* entered by the Board on December 7, 2017, and (2) *Second Entry on Rehearing* entered by the Board on June 21, 2018 (collectively, "Board's Orders"). Pursuant to S.Ct.R.Prac. 10.02(A)(2), copies of both of the Board's Orders are attached hereto.

Appellants are parties of record in Case Number 17-1148-EL-BGA, and on December 27, 2017, timely filed their *Application for Rehearing* of the Board's December 7, 2017 *Order on Certificate* pursuant to R.C. 4903.10 and 4906.12.

The Board's Orders granted Applicant Black Fork Wind Energy, LCC's ("Black Fork") June 6, 2017 *Application to Amend the Black Fork Wind Energy, LLC Certificate Issued January 23, 2012 in Case No. 10-2865-EL-BGN*, thereby amending the Board's January 23, 2012 Certificate of Environmental Compatibility and Public Need ("Certificate") in two respects: (1) the Board approved the use of the Vestas V110 2.2 MW turbine model, a capacity increase from 2.0 MW for the same model that the Board had earlier approved *via* an amendment to the Certificate, and (2) the Board extended the deadline for Black Fork to commence construction of its facility for an additional year, allowing Black Fork to delay commencement of construction until January 23, 2020—an extension in addition to the two-year extension previously granted by the Board that is the subject of an appeal pending before this Court in Case No. 17-412. The Board's Orders are in error for the following reasons:

(1) The Board's Orders are unreasonable and unlawful to the extent they impermissibly restrict the scope of Intervenor's intervention, and in particular, to the extent they purports to preclude Intervenor from addressing the issues of the setback requirements applicable to the amendment of Black Fork's Certificate and the extension of the term of the Certificate. This issue was raised as the first ground for rehearing in Appellants' *Application for Rehearing*, and is fully addressed at pages 6-8 of that application.

(2) The Board's Orders are unreasonable and unlawful because they illegally effect Black Fork's evasion of the now-applicable setback requirements of R.C. 4906.20 and R.C. 4906.201. This issue was raised as the second ground for rehearing in Appellants' *Application for Rehearing*, and is fully addressed at pages 8-12 of that application.

(3) The Board's Orders are unreasonable and unlawful because Black Fork failed to show good cause for an extension of the Certificate. This issue was raised as the third ground for rehearing in Appellants' *Application for Rehearing*, and is fully addressed at pages 12-13 of that application.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Appeal was served, via regular U.S. mail, postage prepaid, and email this 9th day of August, 2018, upon the following:

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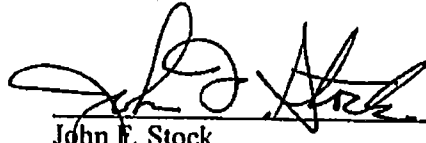
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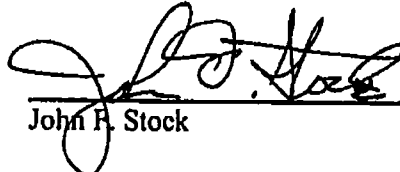
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John F. Stock

CERTIFICATE OF FILING

Pursuant to S.Ct.Prac.R. 3.11(D)(2), 10.02(A)(2), and 10.03(A), the undersigned hereby certifies that a true and correct copy of the foregoing was filed with the Docketing Division of the Public Utilities Commission and the Power Siting Board, 180 East Broad Street, Columbus, Ohio 43215 pursuant to R.C. 4903.13 and 4906.12 and Ohio Admin. Code §§4901-1-02(A), 4901-1-36, and 4906-2-33.



John R. Stock

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
BLACK FORK WIND ENERGY, LLC
REGARDING ITS CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED ISSUED IN CASE NO. 10-2865-
EL-BGN.

CASE NO. 17-1148-EL-BGA

ORDER ON CERTIFICATE

Entered into the Journal on December 7, 2017

I. SUMMARY

{¶ 1} The Ohio Power Siting Board grants the application filed by Black Fork Wind Energy, LLC seeking a capacity increase to use the Vestas V110 turbine model with a 2.2 megawatt capacity and an extension of its certificate to January 23, 2020.

II. DISCUSSION

A. *Procedural History*

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.

{¶ 3} Pursuant to R.C. 4906.10, the Board's authority applies to major utility facilities and provides that such facilities must be certified by the Board prior to the commencement of construction. The Board promulgated rules as set forth in Ohio Adm.Code Chapter 4906 prescribing regulations regarding applications for wind-powered electric generation facilities.

{¶ 4} Black Fork Wind Energy, LLC (Black Fork or Applicant) is a person under R.C. 4906.01(A) and is certificated to construct, operate, and maintain a major utility facility, in the form of a wind-powered electric generation facility.

{¶ 5} On January 23, 2012, the Board granted the application of Black Fork for a certificate to construct a wind-powered electric generation facility located in Crawford and

Richland counties, Ohio. *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN (*Certificate Case*), Opinion, Order, and Certificate (Jan. 23, 2012). The Board granted Black Fork's application pursuant to a stipulation filed by Applicant, the Ohio Farm Bureau Federation (OFBF), and the Board Staff (Staff), subject to 80 conditions set forth in the stipulation. Black Fork was approved to construct a major utility facility in the form of a wind-powered electric generation facility with up to 91 wind turbines with a combined generation capacity of up to 200 megawatts (MW). The project area is located in Crawford and Richland counties, Ohio.

(¶ 6) On May 24, 2012, certain intervenors appealed the Board's decision to the Supreme Court of Ohio (Court). The Court affirmed the Board's decision on December 18, 2013.

(¶ 7) On September 12, 2014, in Case No. 14-1591-EL-BGA (14-1591), Black Fork filed an application to modify its certificate in order to utilize two additional turbine models, the Vestas V110 (2.0 MW) turbine and the GE 2.3-107 (2.3 MW) turbine for this project. The Board approved that application on August 27, 2015, over the objections of certain intervening parties.

(¶ 8) Additionally, on March 24, 2016, in the *Certificate Case* the Board approved Black Fork's September 12, 2014 motion to extend the term of the certificate from January 23, 2017 to January 23, 2019. Certain intervening parties appealed the Board's approval of the motion to extend the term of the certificate to the Court. That appeal is currently pending.

(¶ 9) On June 6, 2017, Black Fork filed an application in the above-captioned case proposing an additional modification to the certificate approved in the *Certificate Case* and modified in 14-1591. In its application, Black Fork seeks Board approval to use the 2.2 MW version of the Vestas V110 wind turbine. Additionally, Applicant seeks to extend its certificate first issued in the *Certificate Case* to January 23, 2020.

{¶ 10} Concurrent with the application, Black Fork filed proof of service of the application in this case. Notice of Black Fork's application was published in the *Bucyrus Telegraph Forum*, a newspaper of general circulation in Crawford County, and in the *Mansfield News Journal*, a newspaper of general circulation in Richland County, on June 9, 2017. Applicant filed proof of publication with the Board on June 12, 2017.

{¶ 11} On November 13, 2017, Staff filed a staff report of investigation evaluating the application (Staff Report).

B. Motion for Waiver

{¶ 12} Concurrent with the filing of the application, Black Fork filed a motion for a waiver of Ohio Adm.Code 4906-3-11-(B)(2)(a)(iii) which requires that a copy of the application be served upon "any property owner along the new route." In support of its request, Black Fork asserts that this application merely involves an increase in capacity for an already approved turbine model and that all significant features of the turbine remain the same including rotor diameter, hub height, and maximum operational sound output. Further, Black Fork notes that this application does not involved a "new" route as premised in the rule. Consequently, given the nature of the requested change and the time and expense of a mass mailing, Black Fork seeks a waiver from the rule requirement and proposes publishing newspaper notice instead. Applicant asserts that a similar motion was granted on April 25, 2016, in Case No. 16-725-EL-BGA and on September 9, 2016, in Case No. 16-1717-EL-BGA. No memoranda contra Black Fork's motion were filed.

{¶ 13} The Board determines that good cause has been presented by Black Fork to grant the requested waiver of Ohio Adm.Code 4906-3-11(B)(2)(a)(iii). Accordingly, the motion for waiver is granted.

C. Motions to Intervene

{¶ 14} On June 30, 2017, the OFBF filed a motion to intervene in this proceeding. No party filed memoranda contra the OFBF's motion to intervene.

{¶ 15} On July 7, 2017, a petition to intervene was filed on behalf of Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington (Property Owners). Property Owners describe themselves as non-participating residents and landowners adjacent to or near the proposed project. Property Owners assert that they have individually been granted intervenor status in either the *Certificate Case*, the 14-1591 case, or both cases. Property Owners submit that they meet all the requirements for intervention in this proceeding in accordance with R.C. 4906.08 and Ohio Adm.Code 4906-2-12(B)(1).

{¶ 16} Black Fork filed a memorandum contra Property Owners' petition to intervene on July 24, 2017. In its memorandum contra, Black Fork argues that two of the Property Owners do not reside within the project area and that, if intervention is granted at all, the Board should limit Property Owners' intervention to the turbine capacity issue. Property Owners filed a reply to the memorandum contra on July 31, 2017, essentially reasserting arguments in favor of intervention and disputing the contentions of Black Fork.

{¶ 17} In accordance with Ohio Adm.Code 4906-2-12(B)(1), the Board finds that the motions to intervene filed by OFBF and Property Owners (collectively, Intervenors) are reasonable to the extent they address Black Fork's request for a capacity increase to the Vestas V110 turbine model for this project. With this qualification, the Board finds that their motions to intervene should be granted. The motions to intervene should be denied, to the extent the Intervenors request intervention for the purpose of addressing irrelevant matters outside of this qualification and the identified scope of this application.

D. Summary of Application

{¶ 18} In its application, Black Fork proposes a capacity increase to the already-approved Vestas V110 turbine model. Black Fork explains that the manufacturer has made technological improvements to the Vestas V110 turbine model, allowing the capacity increase from 2.0 MW to 2.2 MW. Applicant further states that the turbine model's dimensions, including rotor diameter and hub height, remain the same. Black Fork affirms

that it will comply with all certificate conditions established in the *Certificate Case* and in 14-1591. Black Fork submits that the 200 MW nameplate capacity for the project would not change. Black Fork further states that all other information regarding the project previously approved by the Board remains unchanged, including the locations of the turbines, collector substation, access roads, and collection lines. (Application at 2-8.)

{¶ 19} Concurrent with this application, Black Fork seeks a one-year extension of its certificate from January 23, 2019 to January 23, 2020. Black Fork asserts that granting the extension request would afford it the same three-year extension period that other wind farm projects have received. Black Fork claims to have diligently pursued continued development of this project, however, changes in the energy market in Ohio and the Court appeals have impacted the Applicant's construction schedule. Applicant recognizes the Board's well-established practice of granting extensions by motion, however, given the pending litigation over the prior extension grant, Black Fork is requesting the certificate extension through this application. (Application at 5-7.)

E. Summary of Staff Report

{¶ 20} Staff reviewed the pending application and filed a Staff Report on November 13, 2017. The Staff Report reviews Black Fork's proposed modification to the certificate issued in the *Certificate Case*, as modified by 14-1591. Staff reports that since the dimensions of the turbine model do not change, the potential for impacts such as shadow flicker, blade shear, ice throw, and noise will remain unchanged. Staff also notes that there is no proposal to revise any turbine or associated facility locations in the pending application. Therefore, Staff concludes that, considering the proposed change in capacity, the original conditions for the certificate in the *Certificate Case*, as modified by 14-1591 are adequate. (Staff Report at 3-7.)

{¶ 21} In conclusion, Staff recommends that the Board approve the increase in capacity for the Vestas V110 2.2 MW wind turbine provided the Board conditions approval

on Black Fork adhering to all conditions set forth in the *Certificate Case* Order, as supplemented by 14-1591 (Staff Report at 7).

F. Board's Conclusion

{¶ 22} Initially, the Board notes that, in our Order in the *Certificate Case*, we determined that the stipulation entered into between the stipulating parties satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest and necessity, and does not violate any important regulatory principle or practice. Therefore, the Board approved the stipulation in the *Certificate Case*, authorizing Black Fork to construct this project in Crawford and Richland counties, Ohio.

{¶ 23} As stated previously, the stipulation in the *Certificate Case* established 80 conditions. Consistent with the *Certificate Case*, the acceptable turbine models for the project would be the Vestas V100 (1.8 MW), GE XLE (1.6 MW), and the Siemens SWT-2.3-101 (2.3 MW). Thereafter, in 14-1591, the Board approved an application that added the GE 2.3-107 (2.3 MW) and the Vestas V110 (2.0 MW) turbine models to the list of acceptable models to be used for this project.

{¶ 24} The application in the above-captioned proceeding would permit the increase in capacity for the Vestas V110 from 2.0 MW to 2.2 MW. The Board finds that Black Fork properly filed this case for our review and consideration, thereby providing for the necessary notice and due process afforded to applications regarding certificates issued by the Board.

{¶ 25} The Board finds that, as set forth in the application before us, and verified in the Staff Report, there is no material increase in any environmental impact of the facility and no change in any portion of the facility's location, including the location of the individual turbines, from what was originally certificated in the *Certificate Case*, as modified by 14-1591 (Staff Report at 7). Therefore, a hearing was not necessary to consider those factors. Moreover, the increase in capacity of the Vestas V110 2.2 turbine model does not affect our

conclusion from the *Certificate Case* that the project satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest, and does not violate any important regulatory principle or practice.

[¶ 26] As set forth in the application and verified in the Staff Report, the application merely seeks to permit the increase in capacity to include the Vestas V110 2.2 turbine model in order to take advantage of technological improvements. Further, as set forth in the application and verified in the Staff report, the proposed turbine model's dimensions and maximum sound power output remain virtually the same as the certificated models. (Application at 2-8; Staff Report at 6.) Additionally, according to the Staff Report, the Vestas V110 2.2 MW turbine model includes the same safety features to address potential issues in the event of high wind speeds, there will be no change to potential for impacts such as shadow flicker, blade shear, and ice throw, and no change to noise impacts. Further, the Staff Report finds that Black Fork's adherence to the conditions set forth in the *Certificate Case Order*, as supplemented by 14-1591, will adequately address safety considerations. Finally, no other aspects of the approved project are sought to be modified by the application. (Application at 2; Staff Report at 3.)

[¶ 27] Upon our deliberation of the specific request proposed by Black Fork in this application, as well as the recommendations set forth in the Staff Report, the Board finds that, based on the facts of this case, the application should be approved, subject to the conditions set forth in the *Certificate Case Order* as supplemented in 14-1591, and that the conditions set forth in the *Certificate Case Order* will adequately address the increase in capacity for the proposed Vestas V110 2.2 turbine model. In making the determination in this matter, the Board highlights that the current application merely seeks a capacity increase for a previously approved turbine model without any changes in turbine locations or turbine dimensions. Accordingly, based upon the circumstances presented by this case, the Board approves the application of Black Fork seeking approval of the increase in capacity for the Vestas V110 2.2 turbine model for this project.

{¶ 28} Regarding Black Fork's request for a one-year extension of the certificate, the Board notes that R.C. 4906.06 states that an application for a certificate shall be filed not more than five years prior to the planned date of commencement of construction. The statute continues, however, by stating that this five-year period may be waived by the Board for good cause shown. Similarly, the Board's rules in Ohio Adm.Code 4906-5-03(F) directs an applicant for a certificate to provide a proposed schedule covering all major activities and milestones for a electric generating facility project including construction of the facility and placement of the facility in service. This requirement may be waived upon application or motion of a party pursuant to Ohio Adm.Code 4906-5-01(B). As acknowledged by Black Fork in its application, the Board's long-standing practice has been to consider extensions of certificates through motions in the certificate case rather than through an application process. Upon consideration of Black Fork's request and being cognizant of similar extensions granted to other wind facility projects, the Board finds that Black Fork has established good cause for a one-year extension of the certificate in this matter.

G. Findings of Fact and Conclusions of Law

{¶ 29} Black Fork is a person under R.C. 4906.01(A).

{¶ 30} Black Fork's electric generation facility is a major utility facility under R.C. 4906.01(B)(1).

{¶ 31} On June 6, 2017, Black Fork filed an application in this proceeding regarding the certificate issued in the *Certificate Case*, as supplemented by 14-1591.

{¶ 32} The June 6, 2017 application proposes an increase in capacity for the Vestas V110 turbine model as suitable for this project.

{¶ 33} On June 6, 2017, Black Fork filed proof of service of the application in this case. Public notice of the proposed application was published in Crawford and Richland counties, Ohio on June 9, 2017, and filed with the Board on June 12, 2017.

{¶ 34} Motions to intervene have been filed on behalf of the OFBF and Property Owners in the area of the project.

{¶ 35} On November 13, 2017, Staff filed a report evaluating the application.

{¶ 36} The proposed changes to the certificated facility do not result in a substantial change in the location of the facility or any material increase in any social or environmental impact. Therefore, an evidentiary hearing is not necessary.

{¶ 37} Based on the record and in accordance with R.C. Chapter 4906, the application regarding the certificate of environmental compatibility and public need for Black Fork's electric generation facility, issued in the *Certificate Case*, as modified by 14-1591, should be approved, subject to the conditions set forth in the *Certificate Case*, and as supplemented by 14-1591 and this Order.

III. ORDER


{¶ 38} It is, therefore,

{¶ 39} ORDERED, That Black Fork's application be approved subject to the conditions set forth in the Order in the *Certificate Case*, as supplemented in 14-1591 and this proceeding. It is, further,

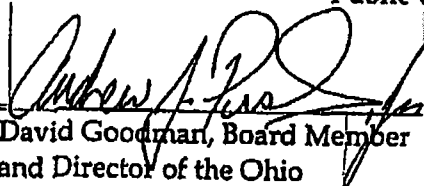
{¶ 40} ORDERED, That the motion to intervene filed by the OFBF and Property Owners be granted, to the extent set forth herein. It is, further,

[¶ 41] ORDERED, That a copy of this Order on Certificate be served upon all parties and interested persons of record.

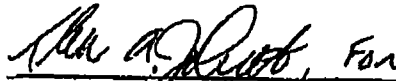
THE OHIO POWER SITING BOARD



Asim Z. Haque, Chairman
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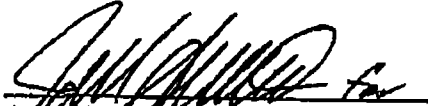
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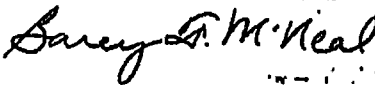
David Daniels, Board Member
and Director of the Ohio
Department of Agriculture



Jeffrey J. Lechak, Board Member
and Public Member

JRJ/vrm

Entered in the Journal
DEC 07 2017



Barcy F. McNeal
Secretary

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
BLACK FORK WIND ENERGY, LLC
REGARDING ITS CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED ISSUED IN CASE NO. 10-2865-
EL-BGN.

CASE NO. 17-1148-EL-BGA

SECOND ENTRY ON REHEARING

Entered in the Journal on June 21, 2018

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington.

II. PROCEDURAL HISTORY

{¶ 2} Black Fork Wind Energy, LLC (Black Fork or Applicant) is a person as defined in R.C. 4906.01.

{¶ 3} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 4} R.C. 4906.06(E) provides that an application seeking to modify a certificate shall be in such form and contain such information as the Board prescribes.

{¶ 5} On January 23, 2012, the Board granted the application of Black Fork for a certificate to construct a wind-powered electric generation facility located in Crawford and Richland counties, Ohio. *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN (*Black Fork Certificate Case*), Opinion, Order, and Certificate (Jan. 23, 2012). The Board granted Black Fork's application pursuant to a stipulation filed by Applicant, the Ohio Farm Bureau

Federation (OFBF), and the Board Staff (Staff), subject to 80 conditions set forth in the stipulation. Black Fork was approved to construct a major utility facility in the form of a wind-powered electric generation facility with up to 91 wind turbines with a combined generation capacity of up to 200 megawatts (MW). The project area is located in Crawford and Richland counties, Ohio.

{¶ 6} On May 24, 2012, certain intervenors appealed the Board's decision to the Supreme Court of Ohio (Court). The Court affirmed the Board's decision on December 18, 2013.

{¶ 7} On September 12, 2014, in Case No. 14-1591-EL-BGA, Black Fork filed an application seeking to utilize two additional turbine models, the Vestas V110 (2.0 MW) turbine and the GE 2.3-107 (2.3 MW) turbine for this project. The Board approved that application on August 27, 2015, over the objections of certain intervening parties. *See, In re Application of Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA (14-1591), Order on Certificate (Aug. 27, 2015).

{¶ 8} Additionally, on March 24, 2016, in the *Black Fork Certificate Case* the Board approved Black Fork's September 12, 2014 motion to extend the term of the certificate from January 23, 2017 to January 23, 2019. Certain intervening parties appealed the Board's approval of the motion to extend the term of the certificate to the Court. That appeal is currently pending.

{¶ 9} On June 6, 2017, Black Fork filed an application in the above-captioned case for approval to use the 2.2 MW version of the Vestas V110 wind turbine. Additionally, Applicant seeks to extend its certificate first issued in the *Black Fork Certificate Case* to January 23, 2020.

{¶ 10} By Order on Certificate (Order) issued December 7, 2017, the Board granted the application filed by Black Fork seeking a capacity increase to use the Vestas V110 turbine model with a 2.2 megawatt capacity and an extension of its certificate to January 23, 2020.

Additionally, the December 7, 2017 Order granted intervention in this matter to Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington.

{¶ 11} R.C. 4906.12 provides, in pertinent part, that R.C. 4903.10 shall apply to any proceeding or order of the Board in the same manner as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 12} R.C. 4903.10 permits any party who has entered an appearance in a Commission proceeding to apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

{¶ 13} Further, Ohio Adm.Code 4906-2-32 states that any party or any affected person, firm, or corporation may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner and form and circumstances set forth in R.C. 4903.10.

{¶ 14} On December 27, 2017, intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington filed an application for rehearing of the Board's Order.

{¶ 15} On January 8, 2018, Black Fork filed a memorandum contra intervenors' application for rehearing.

{¶ 16} On January 24, 2018, the administrative law judge (ALJ) found, pursuant to Ohio Adm.Code 4906-2-32(B), that to the extent intervenors' application for rehearing has been filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32, which is a matter for the Board's determination, rehearing should be granted for the limited purpose of affording the Board additional time to consider the issues raised in intervenors' application for rehearing.

III. DISCUSSION

[¶ 17] In their first assignment of error, intervenors submit that the Board's December 7, 2017 Order is unreasonable and unlawful to the extent it impermissibly restricts the scope of their intervention particularly as it precludes intervenors from addressing setback requirements and the extension of the term of the certificate. Citing to *Moore v. City of Middletown*, 133 Ohio St.3d 55, 63-66, 2012-Ohio-3897 at ¶¶ 33-43, intervenors assert a protectable interest in the proper application of the pertinent setback requirements. Moreover, as adjacent and nearby property owners, intervenors also claim an interest in ensuring that the time within which Black Fork must commence construction of the project is reasonable so as to not unduly burden their property for an extended period of time.

[¶ 18] In its memorandum contra, Black Fork asserts that, given the intervenors' stated interests, the Board properly limited intervenors' scope of intervention. Black Fork submits that the burden to establish good cause to intervene rested with the intervenors but that the intervenors failed to explain how a capacity increase to an already-approved turbine model or the certificate extension would impact them other than stating that they were trying to avoid additional adverse impacts on their land, residences, roads, communities, and lives. Black Fork claims that, through their intervention, intervenors are attempting to improperly expand the scope of this proceeding into matters previously determined by the Board. The Board has already decided this issue in Applicant's favor in the past according to Black Fork. See, *Black Fork Wind*, Order on Certificate (Aug. 27, 2015); *In re Application of Greenwich Windpark, LLC*, Case No. 15-1921-EL-BGA (*Greenwich*), Second Entry on Rehearing (Aug. 17, 2017). Black Fork asserts that re-litigation of already-decided issues also implicates the doctrine of collateral estoppel and should not be allowed here.

[¶ 19] Intervenors' first assignment of error is denied. As noted in the Board's December 7, 2017 Order, the only change to the proposed facility was a capacity increase to the already-approved Vestas V110 turbine model. No dimensions of the Vestas V110 turbine model changed from what was previously-approved and all other physical aspects

of the project remain the same including approved turbine sites, the location of the collector substation, access roads, and collection lines. Intervenor's reliance on *Moore* is unavailing as that case involved zoning matters and arguments concerning constitutional issues. In the present case, there is no issue concerning zoning and the Board does not resolve constitutional issues. Further, as the Board has previously determined, a desire to re-litigate legal issues that the Board has already decided in a prior certification proceeding in the past is not a sufficient interest that allows for intervention and further consideration on those issues in the pending proceeding. See, *Black Fork Wind*, Order on Certificate (Aug. 27, 2015); *Greenwich*, Second Entry on Rehearing (Aug. 17, 2017). Additionally, the re-litigation of already-decided issues also implicates the purposes underlying the doctrine of collateral estoppel and should not be entertained in this matter. Under the circumstances presented, the Board acted reasonably in limiting the scope of intervention. Rehearing on this assignment of error is denied.

{¶ 20} Intervenor's second assignment of error alleges that the Board's December 7, 2017 Order is unreasonable and unlawful to the extent it precluded intervenors from addressing the issues of setback requirements applicable to an application for a capacity increase pursuant to R.C. 4906.20 and 4906.201. Intervenor's assert that, despite the fact that the applicable setback was their primary contention in their petition to intervene, the Board completely ignored this issue in the December 7, 2017 Order. Additionally, intervenors assert that the current versions of R.C. 4906.20 and 4906.201 (as amended in Am.Sub.H.B. 483, effective September 15, 2014) compel the Board to subject any amendment to an existing certificate to the latest setback requirements (i.e., 1,125 feet from the property line of the nearest adjacent property). Since September 15, 2014, intervenors claim the Board has permitted Black Fork to amend its certificate twice by adding two new turbine models for use on this wind farm project and permitting the extension of the certificate. Intervenor's claim that the Board must, therefore, reconsider its December 7, 2017 Order and compel adherence to the now applicable setbacks.

{¶ 21} As an initial matter, Black Fork argues that intervenors' second assignment of error is outside the scope of their intervention and is not, therefore, a permissible issue for them to raise on rehearing. Moreover, Black Fork claims that there are significant constitutional issues involved in applying the Am.Sub.H.B. 483 setback standards to Black Fork's certificate. Black Fork asserts that this is the third time the intervenors have raised this setback argument before the Board and since the Board has twice rejected this argument the Board need not consider it again. Finally, Black Fork notes that the Board has repeatedly taken the position that R.C. 4906.20 and 4906.201 are silent as to the definition of an "amendment to an existing" certificate that would trigger the enhanced setbacks and has used its discretion and expertise to determine what qualifies as an amendment. *See, In re Black Fork*, Case No 10-2865-EL-BGN, Entry on Rehearing (Feb. 2, 2017); *Greenwich*, Second Entry on Rehearing (Aug. 17, 2017).

{¶ 22} Intervenors' second assignment of error is denied. The Board properly granted intervenors limited intervention in this matter to address the sole issue of the capacity increase to an already-approved Vestas V110 turbine model. As noted in *Greenwich, supra*, R.C. 4906.20 and 4906.201 are silent as to the definition of an "amendment to an existing certificate" that triggers enhanced setbacks. Therefore, the Board has used its discretion and expertise to determine what qualifies, just as it must create parameters around the concepts of "change" and "alteration," also found in R.C. 4906.20. In this case, the Board reasonably determined that a mere capacity increase to an already-approved turbine model is adequately covered by the existing conditions of the certificate in the *Black Fork Certificate Case* and does not affect our conclusion that the project satisfies the criteria set forth in R.C. Chapter 4906. Thus, application of the Am.Sub.H.B. 483 setbacks is not warranted.

{¶ 23} Not every proposed change to a major utility facility requires an amendment to an existing certificate regardless of how the application is captioned. Rather, the Board determines from the substance of the pleading whether the change(s) being proposed

necessitate "[a]ny amendment [being] made to an existing certificate" by the Board.¹ The Board begins its review by looking at whether the proposal introduces new impact(s) that cannot be adequately addressed by the conditions of the existing certificate to satisfy the criteria of R.C. 4906.10(A). If a proposal introduces a new impact that the Board determines does not satisfy the statutory criteria without the Board approving a change in the original certificate condition(s), then the proposal is an "amendment" that requires the new setbacks apply under Am.Sub.H.B. 483. However, where the existing certificate conditions are adequate to address/mitigate any impacts of the proposed change, then the Board can approve the change without amending the existing certificate. The Board found exactly such a situation in this case. The change in capacity does not alter any existing conditions and, therefore, the Board could approve the change without amending the existing certificate. It did so and the intervenors second assignment of error is, therefore, denied.

{¶ 24} In their final assignment of error, intervenors assert that the order is unreasonable and unlawful as Black Fork failed to show good cause for a one-year extension of the certificate. While acknowledging that the five-year commencement of construction time frame set forth in R.C. 4906.06(A) may be waived for good cause shown, intervenors note that the Board has indicated that there are important policy considerations to factor into doing so. *See, In re Application of Lima Energy Co.*, Case Nos. 00-513-EL-BGN and 04-1011-EL-BGA (*Lima Energy*), Entry (July 30, 2012). Intervenors submit that the passage of nearly six years has greatly affected the assumptions underlying the Board's 2012 issuance of the certificate and, thus, the Board's failure to address this issue mandates rehearing.

{¶ 25} Black Fork responds that, like the setback issue above, arguments surrounding the extension of the certificate are outside the allowable scope of rehearing and the Board

¹ In a line of analogous utility cases involving the Public Utilities Commission of Ohio (Commission), the Supreme Court of Ohio has stated that the Commission has broad discretion in the conduct of its proceedings. *See, Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 734 N.E.2d 775 (2000); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212, 214 (1987).

should not consider it. Nevertheless, Black Fork posits, good cause exists for the certificate extension. In support, Black Fork notes that it has diligently pursued continued development of the project. Moreover, Black Fork asserts that it faces continued litigation from intervenors with a new appeal pending at the Court (Case No. 2017-0412) on the Board's previous extension of the certificate and seeking imposition of the Am.Sub.H.B. 483 setbacks. As a result, Black Fork opines that good cause exists for the certificate extension and, therefore, intervenors third assignment of error should be denied.

{¶ 26} Intervenors' third assignment of error is denied. Intervenors acknowledge that the five-year time frame in order to commence construction of a project set forth in R.C. 4906.06(A) may be waived for good cause shown. Although the Board's December 7, 2017 Order did not list specifically the arguments Black Fork made in support of its request that the Board found to justify the extension, it is clear from the decision that the Board considered the entirety of Black Fork's request and also that similar extensions have been granted to other wind facility projects. In totality, the Board found such circumstances established good cause for a one-year extension of the certificate. Moreover, the intervenors reliance on the *Lima Energy* decision does not warrant a different conclusion. In fact, after considering all of the arguments made in the *Lima Energy* proceeding, the Board granted the requested extension. In ruling on the one-year request for extension in the December 7, 2017 Order, the Board found persuasive the steps taken by Black Fork that support a finding that the Applicant has pursued a continued development of the wind farm and that any delays are due, in part, to continued litigation concerning this project. Finally, the six-year passage of time since issuance of the original certificate does not require a different outcome. Since issuance of the certificate on January 23, 2012, Black Fork pursued approval to utilize two additional turbine models in 14-1591. The Board had occasion in ruling on the request in 14-1591 on August 27, 2015, to more recently consider whether the 80 conditions adopted in the *Black Fork Certification Case* still satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest, and does not violate any important regulatory principle or practice. Rehearing on this assignment of error is, therefore, denied.

IV. ORDER

{¶ 27} It is, therefore,

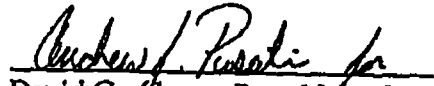
{¶ 28} ORDERED, That the application for rehearing filed on December 27, 2017, be denied. It is, further,

{¶ 29} ORDERED, That a copy of this Second Entry on Rehearing be served upon all interested persons of record in this matter.

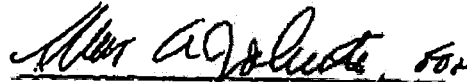
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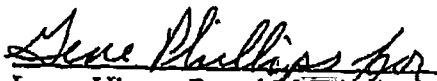
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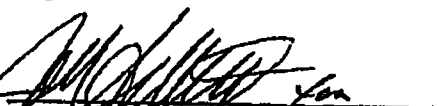
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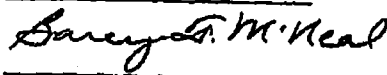
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Secretary